R E P O R T R E S U M E S

ED 015 648 64 EM 004 018

REPORT ON COPYRIGHTS, CLEARANCES, AND RIGHTS OF TEACHERS IN THE NEW EDUCATIONAL MEDIA.

BY- SIEBERT, FRED S.
MICHIGAN ST. UNIV., EAST LANSING

REPORT NUMBER NDEA-VIIB-220 PUB DATE 1 AUG 63
EDRS PRICE MF-$0.50 HC-$4.00 98P.

DESCRIPTORS- *INSTRUCTIONAL MEDIA, *COPYRIGHTS, *INSTRUCTIONAL MATERIALS, *LEGAL PROBLEMS

THE PURPOSE OF THIS STUDY WAS TO EXPLORE 3 GROUPS OF PROBLEMS ARISING FROM THE USE OF NEW INSTRUCTIONAL MEDIA IN AMERICAN EDUCATION--(1) METHODS OF PROTECTING EDUCATIONAL MATERIALS FOR THE NEW MEDIA FROM UNAUTHORIZED USE THROUGH COPYRIGHT AND LITERARY PROPERTY, (2) DESCRIPTION OF EDUCATIONAL MATERIALS WHICH CAN OR CANNOT BE INCORPORATED IN THE NEW EDUCATIONAL MEDIA WITHOUT INFRINGING ON THE RIGHTS OF OTHERS, AND (3) ANALYSIS AND EVALUATION OF VARIOUS TYPES OF COMPENSATION POLICIES IN THE NEW MEDIA AND TEACHER RELATIONSHIPS. (MS)

AMERICAN COUNCIL ON EDUCATION

REPORT

On

Copyrights, Clearances and Rights of Teachers in the New Educational Media

Fred S. Siebert
Michigan State University
East Lansing, Michigan
August 1, 1963

CONTENTS

Acknowledgments

The Advisory Committee to this project, appointed by the American Council on Education, has been most helpful in the conduct of the study and the preparation of this Report.

This Committee consisted of Harry M. Philpott, vice president of the University of Florida, chairman; Hilton C. Buley, president, Southern Connecticut State College; C. R. Carpenter, director of Academic Research and Services, Pennsylvania State University; Harold B. Dunkel, professor of Education, University of Chicago; Sister Annette, C. S. J., executive secretary, Sister Formation Conference, National Catholic Education Association; John F. White, president, National Educational Television and Radio Center; H. I. Willett, superintendent, Richmond, Virginia Public Schools and David C. Stewart, secretary, Joint Council on Educational Broadcasting, ex officio.

Mrs. Dorothy R. Smith of the American Council on Education staff, has served as assistant director to the project and has drawn on her extensive knowledge of educational television in the direction of the study and in the preparation of this Report.

Three young men who have served as research assistants to the project deserve special commendation for their contributions. They are Don Greene and Stuart Feldstein, senior law students at the University of Michigan, and Roger Skolnik, graduate student at Michigan State University.

The following have also contributed their time and talents to this study: Eugene N. Aleinikoff, general counsel, National Educational Television and Radio Center; Lawrence E. Dennis, Director of the Commission on Academic Affairs, American Council on Education; Winston Ehrman, staff associate, American Association of University Professors; Robert V. Evans, legal department, Columbia Broadcasting System; Abe A. Goldman, general counsel, Copyright Office; Robert B. Hudson, vice president, National Educational Television and Radio Center; Charles J. McIntyre, coordinator of instructional television, University of Illinois; Edwin M. Marshall, assistant vice president, American Association of Advertising Agencies; Vincent T. Wasilewski, executive vice president, National Association of Broadcasters; and Harold E. Wigren and Anna L. Hyer, National Education Association.

Expert typing and proofreading have been contributed by Mrs. Kay Williams and Mrs. Sylvia Littman.

Fred S. Siebert
East Lansing,
Michigan

Copyrights, Clearances and Rights of Teachers in the New Educational Media

Introduction

The purpose of this study is to explore, and wherever possible recommend solutions for, three groups of problems growing out of the use of the new instructional media in American education.

These problems can be identified as: (1) methods of protecting educational materials for the new media from unauthorized use through such legal concepts as copyright and literary property; (2) identification and description of educational materials which can and cannot be incorporated in the new educational media without infringing the rights of others; and (3) analysis and evaluation of various types of compensation policies in the new media and teacher relationships.

The problems briefly described above have become of increasing importance to American education at all levels because of the development and widespread use of the new media as instructional tools. These media include all kinds of visual aids, films, radio programs and audio-recordings, television instruction - both broadcast and closed-circuit, sound and sight recordings of television programs in the form of kinescopes and videotapes, and finally the host of auto-instructional devices commonly called programed learning or "teaching machines."

The development and expansion of audiovisual materials for instruction in public schools has recently been studied under the Technological Development Project of the National Education Association by James D. Finn, Donald G. Perrin, and Lee E. Campion.( ) They trace

( ). Occasional Paper No. 6. Studies in the Growth of Instructional Technology, I: Audio-visual Instrumentation for Instruction in the Public Schools, 1930-1960, A Basis for Take-off. National Education Association, Washington 6, D. C., 1962.

the growth in the use of these materials from 1930 to 1960. A recent tabulation of audiovisual equipment and materials in use in public schools shows that in the spring of 1961, the public schools in the United States owned 125,000 16 mm sound projectors, 542,600 16 mm film titles, 108,600 radio receivers, 50,000 television receivers, and 1,286,300 tape recordings.( )

( ). Audiovisual Equipment and Materials in U.S. Public School Districts-Spring 1961. Preliminary tabulation prepared for the U.S. Department of Health, Education and Welfare, Office of Education, by the Bureau of Social Science Research, Inc., Washington, D. C.

The development of television as an educational resource has contributed perhaps more than that of any other medium to the emergence of the three groups of problems outlined above. There are now 74 educational television stations across the country. At least 400 educational organizations are now using closed-circuit or low power transmission television as part of their instructional program. Institutions (elementary, secondary, and collegiate) reporting the use of television instruction numbered 12,659 in the latest Compendium of Telecourses for Credit. Enrollees for credit in the above facilities

amounted to 2,776,984 students. These students are enrolled in 30,148 different courses.( )

( ). Compiled and Edited by Lawrence E. McKune, Michigan State University, East Lansing, Michigan, 1962.

The most recent development among the new educational media is the advent and expanded utilization of teaching machines and programed learning. Finn and Perrin list nearly 100 teaching devices and 137 suppliers of such devices.( )

( ). James D. Finn and Donald G. Perrin, Occasional Paper No. 3, Teaching Machines and Programed Learning, 1962: A Survey of the Industry, National Education Association, Technological Development Project, Washington, D. C., 1961.

It should be pointed out that the problems with which this study is concerned are apparently less acute in the area of programed learning and auto-instructional devices than, for instance, in the medium of television. The reason for this is that the producers and distributors of programed learning devices are for the most part independent commercial concerns and have by the very nature of their operations adopted the precedents of the textbook publishing industry. In their relations with contributing teachers, the programed learning producers have generally entered into contracts which specify the rights of the teacher as well as his royalty or other compensation. The teacher, in turn, has been guided by precedents in the book publishing field and in most cases considers his contribution to the learning program as an independent activity outside his regular teaching duties.

Although the expansion of the use of the new instructional media has created new problems in the areas of copyright protection, use of protected materials and compensation for teachers, these problems did not become acute until the practice of recording educational materials in one form or another and the re-use and exchange of these recordings became widespread. No major problems arose when an instructional program was broadcast live on radio. The same was true for a local live evanescent television program. But when television programs began to be recorded for re-use within the institution, and more particularly when these programs were exchanged, sold or leased, a host of problems arose. For example, prints of some 400 recorded telecourses are now available from the National Instructional Television Library in New York City or from its two regional counterparts in Lincoln, Nebraska and Cambridge, Massachusetts.

The growing demand for cooperative efforts in the development and use of some of these expensive instructional materials has been pointed out by the National Association of Educational Broadcasters in its recent survey.( ) The more extensive the re-use, the greater the problems of protection, of use of copyrighted contents, and of compensation for teachers and others involved in the production of these educational programs.

( ). National Association of Educational Broadcasters, The Needs of Education for Television Channel Allocations. A project under contract with the Office of Education, U.S. Department of Health, Education and Welfare, U.S.Government Printing Office, Washington, D.C., 1961. pp. 2, 3, 4.

It is readily apparent that if the maximum benefit from educational programs is to be achieved, provision should be made for the widest possible use of such programs. A closed-circuit television course in high school biology is under any circumstances an expensive project. If the course is finally developed, it should be good enough for re-use within the producing educational unit for several years. Not only does its initial cost warrant a re-use within the educational system, but it would seem to be good economics to arrange for the exchange, lease, or license of the course to other educational units. It is this re-use, both within and outside the originating unit, which increases the urgency for solutions to the problems with which this study is concerned.

The principal impetus for the present study grew out of the conclusions and recommendations of a previous study by Jack McBride and W. C. Meierhenry of the University of Nebraska. That study was undertaken under a contract with the Office of Education, U.S. Department of Health, Education and Welfare, and its final report is entitled "A Study of the Use of In-School Telecast Materials Leading to Recommendations as to their Distribution and Exchange."( )

( ). The University of Nebraska, Lincoln, Neb., 1961.

The McBride-Meierhenry study reached seven conclusions:

"1. Considerable instruction is being presented locally at the elementary, secondary, and higher levels of education by means of both broadcast and closed-circuit television.

"2. A backlog of recorded televised instruction is available for distribution.

"3. The establishment of systems for the distribution of recorded televised instruction is urgently needed.

"4. An increasing number of institutions, according to substantial evidence, wish to use recorded televised instruction.

"5. Further study needs to be made to discover the best methods of utilizing recorded televised instruction in classrooms.

"6. The dissemination of information concerning recorded televised instruction is needed.

"7. Production and distribution of materials appropriate for use by television should be continued by both commercial companies and educational institutions."( )

( ). Ibid. p. 65.

In the section on "Problems Needing Further Study," McBride and Meierhenry recommended that if the production and distribution of recorded televised instruction and supplementary materials are to be facilitated, further study should be made of "A variety of legal problems...foremost among these are the ones concerning compensation to television teachers for the re-use of materials."( )

( ). Ibid. p. 70.

Another excellent full report on courses by television in American colleges and universities was prepared by John W. Meany of the University of Texas under the sponsorship of the Fund for the Advancement of Education.( ) Mr. Meany points out that "In seeking to exploit the

---

( ). Televised College Courses, A Report About the College Faculty Released-Time Program for Television Instruction, The Fund for the Advancement of Education, 477 Madison Ave., New York, October 1962.

---

potentials of the new medium, telecourse professors have had to discover how complex and frustrating can be the problem of tracing copyright ownership of the materials they wish to use in their broadcasts and of arranging for their release for educational uses. They have found that the word 'television' has become an unfortunate added burden, conjuring up from the subconscious visions of affluence and unlimited budgets. The charges for using films, film footage, and photographs in telecourses, especially when broadcast, can be far beyond the resources of individual college budgets. It is for this reason that many of the institutions in the Program would like to see a central distribution center of filmed materials produced or cleared for educational television which could be made available at cost."( )

( ). Ibid. p. 23-24.

Under the terms of the agreement between the U.S. Office of Education and the American Council on Education, the three parts of the present study were described as follows:

1. Methods and procedures for the legal protection of property rights in educational programs for the new educational media, including television, radio, closed-circuit television, films, recordings of all types (kinescopes, videotapes), and programed materials. This first part of the study is principally a legal problem. It will investigate the problems created by the law of literary property, copyrights and royalties, unfair competition, "fair use" and contractual relations with teachers, writers, producers, directors, and producing institutions. The proposed study will investigate the most effective methods of

protecting and guaranteeing the rights of the owners, producers, and contributors to the production of instructional materials.

2. The use and restrictions on the use of educational materials in the preparation, production, performance, and distribution of educational programs for the new educational media. The second part of the study will concern itself with the legal restrictions on the use of instructional materials, such as text matter, pictures, quoted materials, music, adaptations, dramatizations, etc., in the production of programs for the new educational media. Such a study will include the problems arising from the various uses to which such instructional programs would be put, such as by educational television stations, by commercial stations, and by private and publicly supported educational institutions. The problems in this section arise from the use by producers of units of materials created by others and available for use in the construction and production of educational programs.

3. The compensation and rights of teachers and other personnel in the preparation, production, performance, and distribution of educational programs,as described above. This third part of the study will investigate the problems created by the contribution of personnel, particularly teaching personnel, in the planning, preparation, production, performance, and distribution of programs for the educational media, as set forth above. This area is less a matter of law than it is a matter of custom, agreements, negotiation, and general policy. This part of the study will also undertake to examine the existing relationships between the teacher and his contribution to the new media, a study of analogous

situations and the procedures and relationship of such situations, of which writers and performing talent for motion pictures, radio, and television are the principal examples.

The current study undertook to survey the legal literature and court decisions in the relevant areas, and to confer with such groups as the American Association of University Professors, American Textbook Publishers Institute, National Association of Educational Broadcasters, National Education Association, National Educational Television and Radio Center, Teaching Films Custodians, and the Center for Programed Instruction.

A detailed questionnaire was prepared and mailed to elementary, secondary and collegiate institutions with experience in the use of the new educational media. Depth interviews were held with a selected list of institutions representing the various types of educational efforts.

The problems of international copyright are not discussed in this Report. The methods of protection of American educational programs in foreign countries and the clearance of foreign materials for use in educational programs in the United States should at some future date be investigated under a separate study.

The following Report is written not for the copyright specialist nor for the lawyer but for the educator, whether he be an administrator or a teacher, to inform him of what are his rights and responsibilities in relation to the new educational media.

Part I.

Protection for Educational Programs Prepared for the New Media

Who owns the educational programs prepared for such new media as radio, television (both closed-circuit and broadcast), films, and auto-instructional devices, and how are such rights of ownership protected against unauthorized use?

The original capital investment in facilities and in the production of some of these new types of educational programs is sometimes extensive, and although many of these programs are produced by non-profit institutions and organizations whose sole purpose is to obtain as wide dissemination as possible, there frequently remain the problems of recouping costs and building up capital for revision and for the production of additional programs.

In addition to the technical costs of producing such programs there is the cost of the participating personnel, particularly the teacher. Although the teacher is engaged in a public service, he is living in a free enterprise world and like members of other professions he would like to receive a remuneration commensurate with his contribution.

The problem has been stated graphically by Norman E. Jorgenson, communications attorney:

> "Teachers, of course, have wittingly or unwittingly been producing copyrighted works in the ordinary course of classroom instruction since the days when the Constitution was adopted. Until recently, however, copyright was a very esoteric subject to the teaching profession, of interest only to those who wrote textbooks, treatises, or other pedagogical works. The ordinary classroom teacher has never, to my knowledge at least, been concerned that someone would copy his lecture or chart or

teaching method and reproduce it verbatim for commercial purposes. The teachers I've known have never been particularly disturbed by an audience busily at work taking notes and copying from the blackboard. Their concern has been with those who didn't. With the advent of educational TV, the teacher is confronted for the first time with a foreseeable possibility that not merely his ideas but his form of presentation will be widely disseminated and copies, not only to his knowledge and with his consent but also by unauthorized persons for unforeseen uses. In a day when the teacher has become not only a script-writer and scenery designer but actor as well in a TV show widely disseminated and easily recordable or taped, I believe that he has become aware of and is concerned about possible protection for his craftmanship."( )

( ). Proceedings, Conference on Professional Rights and Responsibilities and Teachers in Relation to the Newer Educational Media, National Educational Association, Washington, 1962, p. 68.

---

1. The Problem of Ownership

The first problem concerns the rights of ownership in these educational programs and how these rights may be protected.

Who is the original owner of the Program?

The law recognizes ownership rights in a piece of intellectual property( ) in the following: (1) an individual, (2) jointly by several individuals, and (3) in a recognized legal entity such as a corporation or association. In addition the piece of property may in itself be divided, with a part owned by one or more individuals or institutions.

( ) Intellectual property does not include the ownership right to an "idea."

All these types of ownership may occur in connection with an educational program. An auto-instructional device may be owned by an

individual, jointly by several individuals, by a commercial corporation or by a non-profit educational institution. A television series may be owned by a university, by a public library, by a producer, or even by a professor. In a film, the right to exhibit may be in one person, the right to make copies in another, the right to televise in still another.

The answer to the question as to who owns the program depends on (1) who is the original owner and (2) has he transferred part or all of the ownership to another or others.

The original owner or first owner of a piece of intellectual property is the author, creator or inventor. All subsequent and subsidiary owners derive whatever rights they have from him. However, to identify the original author, creator or inventor of an intellectual work is not always simple.

Let us begin with the most familiar and traditional teaching device, the textbook. A professor at a university conceives the idea that the information in his lectures might make a suitable textbook. There is a market for such a book and he could supplement his salary by selling his printed lectures. He is the sole and original owner of the textbook.

Now, let us complicate the situation further. The teacher is one of a group of six in charge of a Freshman course. The group at a meeting decides that a textbook is needed and proceeds to divide the work, giving each member of the group specific chapters to complete. The six individuals are now joint owners of the text. A photographer is requested to take some pictures to illustrate the text. The photographer is the original owner of the pictures.

But neither the six teachers nor the photographer have the capital to publish the book in printed copies. A textbook publisher is approached and he makes an agreement to buy the manuscript from the teachers for a lump sum, and the same arrangement is made with the photographer. Now the publisher is the owner having derived his rights of ownership from the original creators.

The ownership patterns in educational programs for the newer media become much more complex. Most of these programs are created not by an individual but by groups of individuals. Many of them are not in the familiar form of a book but in the more complex form (as far as ownership rights are concerned) of motion picture films, sound recordings, and kinescopes or videotapes. We can have not only joint and institutional ownership of the program, but divisibility of ownership; that is, special rights in the program may belong to different individuals.

For our purposes of discussion of ownership, such media as motion pictures and recorded television programs in the form of kinescopes and videotapes can be grouped together. From our survey of the educational field, in answer to the question as to who owns the television program, kinescope or videotape, more than 80 per cent of the replies from all institutions indicated that ownership was in the educational institutions rather than in an individual. This answer is understandable since in most cases the conception and production of the program began with the institution or by persons hired by the institution for this special purpose, and therefore the institution is the original owner.

Subsidiary or derivative ownership.

The law allows the transfer of ownership from the original owner to other persons or institutions. The most common example is ownership resulting from employment. When a worker in a factory produces a product which he is hired to produce, the product belongs to the factory. A teacher in a public school is hired to produce a course outline in elementary arithmetic, and the outline belongs to the school system which employs her. If a group of persons,including the teacher, the producer, the script writer, the cameraman, the artist, is hired to produce an educational television program, the end product belongs to the employer.

A complex and sometimes disturbing problem arises when a teacher or a group of employees produces a program outside the scope or terms of their employment. A professor writes a textbook based on his classroom lectures in his spare time; the product belongs to him and not to his employer. A teacher participates in a television program under released time from other duties; the program belongs to the employer. Sometimes it is extremely difficult to tell whether the product was produced inside or outside the terms of employment. Reference must be made in cases like this to the actual terms of the teaching contract, if there is one. If the subject is not covered in the contract, there is the possibility of an implied agreement or understanding between the institution and the teacher. The recommended procedure in order to avoid later misunderstandings is to provide a simple written agreement under which the teacher and others of the producing group agree to undertake the job with the understanding that the educational program they produce will belong to the employing unit.

Another type of subsidiary or derivative ownership occurs when the original owner transfers his ownership rights through some recognized legal device. The most common method is by direct sale. A professor sells his manuscript to a publisher; the publisher now becomes the sole owner and acquires all the rights which the professor originally had. Such a sale may be a simple transfer of the manuscript in exchange for money, or it may be an elaborate and complex contract calling for royalty payments to the professor based on the number of copies sold. By the same method an individual or an institution may become the owner of an educational program such as a film or kinescope prepared for the new media.

One feature of such a transfer of ownership should receive special notice. A transfer of ownership from A to B usually means the transfer of all rights of ownership. In the absence of special provisions there may be the assumption that all other rights are transferred. In an outright sale, there are no residual rights. Any so-called "residual rights"( ) must be specially and specifically reserved to the original

---

( ). Since the term "residual rights" is somewhat misleading (because it connotes to the teacher that he has remainder rights without specific contractual arrangements for the retention of these rights) the term "reserved rights" is preferred.

---

owner in the terms of the sale. Unless such reservations can be proved by a contract in writing or by witnesses, the transferee gets all.

Reserved rights.

Ownership in property, including intellectual property, is a bundle of rights, and that bundle may be large or small depending on

what the law allows for the specific kind of property. In intellectual property, which includes the types of ownership with which we are presently concerned, the bundle of rights is different from the bundle of rights which the owner of a piece of real estate may have. There are certain things which the original or the subsidiary owner of an educational program may do with the program, and there are other things which he cannot do without losing his rights.

Let us look at the bundle of ownership rights in an educational film. These rights include the actual ownership of the physical materials out of which the film is made, the right to make copies of the film, and the right to exhibit it. They include conversely the right to stop others from making copies or exhibiting the film. The owner's rights may be further subdivided by granting out parts of his original rights. He may transfer his right to make copies in color, or the right to exhibit the film in California or in South America. The degree to which he might subdivide his original rights by contract is almost infinite. The owner of an educational film may sell copies of the film, may authorize the exhibition of copies in special geographic territories, may restrict the use to special audiences, and may establish rental rates for its exhibition.

The teacher who participates in the production of an educational program has some special interests in the area of reserved rights. Many teachers would like to receive extra compensation if the program is used outside the originating school system. This right must be specifically reserved in an agreement with the school system. Some teachers

would like to reserve the right to determine in what part of the country the film is shown. This too must be reserved by a special provision; otherwise the school system as owner can show the film wherever it pleases.

Many professional teachers would like to retain some control over the period of time during which the film can be shown. An educational film or television program can rapidly become obsolete in many learning areas, and the teacher can suffer embarrassment before his colleagues if after a period of five or ten years, his film, now outmoded, continues to be shown. Here again the owner of the program, in most cases the institution, has full legal right to determine how long the film can be shown unless there is a special reservation made in the agreement with the teacher. A discussion and recommendations on how to handle this problem will be found in Part III of this Report.

In summary, the original owner of an educational program is the author, creator or inventor. This may be an individual, a group of individuals, or an institution. The products of an employee working within the terms of his employment normally belong to the employer or the employing institution. In almost all cases of educational programs for the new media, the owner, either original or derivative, is an institution. As owner, the institution usually acquires all rights of ownership unless some special rights are specifically reserved. Normally a teacher has no "residual" rights, but only those rights specifically reserved to him by special provision in the employment contract or transfer agreement. In the absence of such contract or agreement, the full ownership rights belong to the institution.

We now proceed to a discussion of the legal methods of protecting ownership rights in educational programs. Such protection may be secured either by (1) common law or (2) by statutory copyright.

At the outset, it should be made clear that common law copyright as administered by the states and statutory copyright as administered by the federal government are mutually exclusive. One may rely either on the common law for protection of his rights or on the federal statute but not on both. The principle that the common law rights ended with statutory protection and that statutory protection destroyed the common law rights in literary property was decided in the 18th century by the British courts and adopted by the United States Supreme Court shortly thereafter.

2. Protection of Ownership Rights Under Common Law.

The common law as administered by the various states provides legal protection for the owner, either original or derivative, in all types of intellectual property including educational programs prepared for the new media. This branch of the common law is sometimes referred to as the law of literary property (although protection extends far beyond the purely literary) and sometimes as common law copyright. The other type of protection, discussed below, is provided under the federal copyright statute.

The following discussion seeks to answer the questions: (1) under what circumstances are ownership rights in programs protected at common law? (2) what are the various rights which the common law recognizes in an intellectual production? and (3) what are the advantages and

disadvantages of reliance on the common law for protection of rights?

Common law protection lasts only so long as the intellectual work remains "unpublished." After publication the owner must conform to statutory requirements and must rely upon statutory protection. Therefore the determination of when publication takes place becomes an important issue. Before publication the owner or proprietor has common law rights; after publication, he has only those rights given him by the federal statute and his work must be copyrighted if he is to retain his rights of ownership.

The definition of what is publication has gone through a tortuous history. The earliest and simplest case was the publication of a printed book. When the book was in manuscript form, it was protected by the common law. When it was reproduced in printed copies and these copies were offered for sale, it was "published," whereupon the common law protection ceased. It was assumed that when the work was published it was dedicated to the public and became part of the public domain with no further rights in the original owner. If further protection was desired, such protection would have to be provided by a legislative body in the form of an enacted statute. The British Parliament passed the first copyright statute in 1710 and the first American federal Act was passed in 1790.

As other categories of protectable works were added to books, the problem of when publication took place became more complex. The British courts decided that even though the script of a play was duplicated in copies which were to be used for the production or

performance of the play, the play was not published. However, if the play was printed and sold in book form, it was treated like any other book by the common law and became a part of the public domain. From these decisions by the British and American courts, we come to the proposition that performance in itself is not publication so as to destroy common law rights.

This proposition is significant when applied to the new educational media. It means that a television program can be broadcast to millions without being "copyrighted" and without losing its common law protection since it is still "unpublished." The original copy of an educational film can be shown in every high school in the land without destroying the ownership rights of the proprietor of the film. A kinescope of a classroom lecture can be made and shown in every college in the country, but any unauthorized use or copying of the kinescope can be controlled by the owner under the common law.

However, just as it is possible for the playwright to lose his rights by publishing the play as a book, it is possible for the owner of an educational program to lose his exclusive rights by "publication." When is an educational film or radio or television program published so that it must be "copyrighted" in order to continue the rights of ownership?

As we have seen, the mere showing or performance of the program is not publication. But the duplication in physical form of the program for future showings may be such publication. Many educational programs are duplicated in some form, and in fact most visual aids depend for

their use on such duplication. If an educational film is made in several copies, and these copies are offered for sale, the film is published and the owner loses all rights under the common law. However, if the film, although duplicated in several copies, is not offered for sale but is used solely within the originating school system, no publication takes place. A television program may be put on videotape and this videotape shown indefinitely without loss of rights so long as duplicates are not made for sale.

The problem becomes more intricate when the copies of the film or tape are available to a restricted group. A film is shown at a rental charge to all public school systems. No publication takes place, although there is a minority opinion to the contrary. If copies of the film are made available so that the purchaser may retain the copy and control the exhibition, this is no longer "performance" but "publication." As long as the owner rents out or licenses a copy of the film for showing only, he can rely on his common law right; when he sells a print of the film, he loses his common law rights.

Can filmed, kinescoped or videotaped copies of an educational program be exchanged among educational institutions? A number of midwestern universities are working on a program of such exchange. Must these programs be copyrighted to retain original rights or will they be protected by the common law? It is submitted that an exchange agreement does not constitute publication, but that a license or sale of prints does.( ) However, if a wide exchange is contemplated such as

through NETRC, it might be desirable to copyright the program.

( ). The Copyright Office has recommended that the Copyright Act be amended by Congress to provide that "performance" would constitute "publication." The report proposes "that common law protection should end, and the term of statutory copyright should begin, when a work has been 'publicly disseminated' in any of the following ways: (1) publication of copies, (2) registration, (3) public performance, or (4) public distribution of sound recordings." Copyright Law Revision, Report of the Register of Copyrights, U.S.Government Printing Office, Washington,D.C., 1961, p. VI.

Advantages and disadvantages of common law protection.

The owner or proprietor of an educational program for the new media has, under some circumstances as described above, the choice of whether he will seek protection of his rights under common law copyright or under the federal copyright statute. Where a choice is possible, what are the advantages and disadvantages of common law protection?

The first advantage is that the protectable rights of the owner or proprietor are broader under the common law than under the federal statute. The common law gives blanket protection against all types of unauthorized use while the copyright statute, discussed below, lists specific rights. For example, unpublished music protected by common law cannot be publicly performed under any circumstances without the consent of the owner, while under the federal statute the copyright owner of music cannot prohibit the performance of music if that performance is "not-for-profit." The broader rights of the common law would also seem to cover "performing rights," that is, property rights of the performer which are not recognized under statutory

copyright. Finally the common law owner of literary property has a greater control over the "fair use" of his work while under the statute the courts have allowed this doctrine to permit certain restricted uses of the copyrighted material without the owner's consent (See infra p.).

A second advantage of common law protection is that it has no time limit. The ownership is indefinite and perpetual whereas the protection under the copyright statute is limited to an initial period of 28 years with the possibility of a renewal for an additional 28 years. In some cases the time limit might not be of any importance, but in others the indefinite protection of the common law would be significant.

A third advantage of the common law is that there are no formalities of registration required. All the owner must do is prove ownership. No forms must be filled out, no fees paid, and above all no "notice" is required on the intellectual work. This means that a television program protectable under the common law need carry no copyright notice. As a matter of policy, however, it would seem desirable where the work is duplicated in a limited number of copies for limited circulation, that some warning be given to unaware or innocent users.

An important advantage of common law protection is that there is no initial cost. No fees must be paid and most important, no copies must be furnished to a government agency. This might be a considerable advantage in the case of a videotape, a copy of which might run into hundreds of dollars.

A final advantage is that sound recordings are protectable under the common law but at present are not copyrightable under the federal statute.

The disadvantages of common law protection are listed below so that the owner of an educational program for the new media can determine whether it is desirable for him to rely upon this type of protection.

The first disadvantage is that there is no clear proof of ownership of the program under the common law. Lacking a registration system, the owner must prove his ownership by other evidence.

A second disadvantage is that no specific damages for violations are collectable at common law as compared with the specific and generous allowances under the federal statute.

A serious disadvantage of the common law is that publication of the program results in forfeiture of the common law rights. The common law owner must be constantly on his guard to see that his property is not "published" as described in the preceding section.

A further disadvantage is that the enforcement of the common law rights of ownership is under the jurisdiction of state law, and this law may vary slightly from state to state. States have been known to be quite erratic in their protection of literary property under the common law.

A final disadvantage is that the determination of the common law right frequently involves jurisdictional problems among the states. In today's commercial and educational world, the crossing

of state lines is most common, and more frequently than not the owner of the common law right is the resident of one state, the infringer a resident of a second state, and the infringement itself takes place in a third state. Under the federal Copyright Act, the federal courts have exclusive jurisdiction.

3. Protection of Ownership Rights Under the Copyright Act.

What program or parts of programs prepared for the new educational media are protectable under the terms of the federal copyright statute?

First of all, most types of unpublished works are not acceptable for statutory copyright but must rely for protection upon the common law as described in the preceding section. Unpublished works include most materials in manuscript form and other types of material which, although duplicated, are not made available for public distribution.

A limited list of unpublished works may be copyrighted under the terms of the federal Act (Title 17, U.S.C., sec. 12). This class of works appears to be limited to those materials which were prepared primarily for performance or exhibition rather than for distribution in the form of copies for sale. The following unpublished materials may be copyrighted: (1) lectures or similar productions, (2) scripts, (3) dramatic, musical or dramatico-musical compositions, (4) motion pictures - both photoplays and documentaries, (5) photographs, (6) works of art, plastic works or drawings. All other types of unpublished works must rely on the common law for protection. In

the limited area of the categories of unpublished works listed above, the owner has a choice of determining which type of protection he prefers, common law or statutory.

On the other hand, published material is without any protection unless it can qualify under the terms of the federal statute. The statute lists thirteen classes of works which are copyrightable:

(1) Books,including composite and cyclopedic works, directories, gazetteers, and other compilations.

(2) Periodicals, including newspapers.

(3) Lectures, sermons, addresses (prepared for oral delivery).

(4) Dramatic or dramatico-musical compositions.

(5) Musical compositions.

(6) Maps.

(7) Works of art; models or designs for works of art.

(8) Reproduction of a work of art.

(9) Drawings or plastic works of a scientific or technical character.

(10) Photographs.

(11) Prints and pictorial illustrations including prints or labels used for articles of merchandise.

(12) Motion-picture photoplays.

(13) Motion pictures other than photoplays.

All written works of an author are protectable under either Class 1, 2, or 3. It is quite clear for example that the script of a radio program can be copyrighted under Class 3. It is also possible to copy-

right all supplementary printed material such as study guides prepared for use in connection with one of the new media (Class 1). Similarly, outlines of courses when duplicated for general distribution can be copyrighted as a book (Class 1). Strip films are copyrightable as photographs (Class 10).

On the other hand the copyright statute makes no provision for the protection of sound recordings. A record either of music or other sounds is not protectable from unauthorized use either by the terms of the Copyright Act or by subsequent court interpretations of the Act. A sound track synchronized with a visual film appears to be protected as a part of the film, but by itself a sound track cannot be copyrighted.

A film is obviously copyrightable either as a photoplay or as a documentary (Classes 12 and 13). A kinescope of a television program is in the form of a film and is protectable as a motion picture. A videotape is a more complex problem. It is not a film, but a magnetic tape, its contents are not immediately visually observable, and it requires a complex machine to make it observable. The Copyright Office has accepted videotapes for copyright but very few have been registered. A kinescope is cheaper to produce in the form of a record, and most television program producers file a kinescope rather than a videotape. There are no court decisions on the question of the copyrightability of a videotape.

What rights are protected under the federal statute? In general, the original or derivative owner of a copyrighted work has the exclusive right to control the use of his work. Such rights include

the right to make copies, to translate, to dramatize, to convert from dramatic form to other forms of literary work, to arrange or adapt a musical composition, to deliver a non-dramatic literary work for profit, to perform a drama even if not for profit, to make a recording, to perform music for profit.

What rights does the owner of a film of an instructional television program acquire by copyrighting the film? He can sell and distribute copies of the film and can prohibit anyone else from so doing. He can prohibit the unauthorized exhibition of the film, and he can control the taking of significant cuttings from it. A copyrighted kinescope would carry the same rights.

Protection of component parts of a program.

Some of the most perplexing problems in the field of copyright arise in connection with the protection of rights in individual parts of a composite program. Since many educational films and kinescopes of television programs are composed of a variety of materials, some of which are unpublished, some of which are in the public domain, and some of which are separately copyrightable or have been separately copyrighted, the problem of determining which rights in which component parts are protected becomes a particularly confusing one. For example, a film or kinescope of an educational program could possibly contain a picture of an uncopyrighted piece of statuary, a close-up of a copyrighted painting, a copyrighted or uncopyrighted photograph of a famous work of art, an uncopyrighted and unpublished lyric, and also an uncopyrighted piece of music.

What rights does the copyright on the program give to the original owners of the uncopyrighted component parts?

The question of the protection of component parts is too complex to be treated in detail in this Report, but a few principles can be set out. Sec. 3 of the Copyright Act gives protection to "all copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the scope or duration of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title."

One authority has interpreted this to mean: "The copyright secured on a televised film program protects 'all the copyrightable components parts thereof.' Thus, if the program is registered as a motion-picture photoplay or motion picture other than a photoplay, the entire contents of the program are protected. The copyright would protect original songs, background music, script and dialogue. If the program includes drawings, photographs, animated cartoons, prints or pictorial illustrations, they would be protected since they are copyrightable component parts."( )

( ). Warner, "Radio and Television Rights," Sec. 32, p. 79.

Normally, the copyright notice on the composite work will serve to protect the copyrightable component parts without repeating the notice for each individual part. Some of the procedural problems

in bringing suit for infringement of a component part can be extremely confusing. Also, where the producer of a film receives permission to use an uncopyrighted and unpublished component part and proceeds to copyright the entire film, the original owner normally continues to retain his common law rights in his part.

Formalities required by the copyright statute.

For the limited list of unpublished works described above, copyright protection can be obtained by filing an application form, depositing one copy, and paying the required fee.

For published works, an application must be presented and fees paid, and two copies deposited. A list of fees is published by the Copyright Office in Circular No. 44. In addition each published copy of the copyrighted work must carry a copyright notice as outlined by the Copyright Office in Circular No. 3 and for Motion Pictures in Circular No. 7.

It is possible to make arrangements with the Copyright Office for the return of the two deposited copies on condition that if requested by the Library of Congress a copy will be supplied for permanent deposit.

Advantages and disadvantages of statutory protection.

The producer of educational programs for the new media needs to know whether his rights in the program can best be protected under the common law or under statutory copyright.

The advantages of statutory copyright are as follows:

1. Ownership of the copyrighted work can readily be established

through the certificate of registration issued by the Copyright Office.

2. The rights which a copyright owner acquires under the federal statute are fairly definite as opposed to the indefiniteness of some of the rights under the common law.

3. The penalties for infringement are definite and can be construed as being fairly liberal in protecting the copyright owner. Profits are easier to prove under the statute because of the shifting of the burden of proof onto the defendant. The statute also gives minimum and maximum damages, provides for impounding and destruction of copies, and allows attorney's fees.

4. The procedure for transfer of ownership in a work copyrighted under the statute is simpler and more definite. Because the statute is federal, the problem of conflict of laws or conflicting jurisdictions is avoided. The title to a copyrighted work, therefore, appears to be more readily marketable if the copyright is obtained under the statute.

5. A copyright notice has a greater psychological restricting effect on a would-be infringer.

6. Protection under international copyright arrangements should be more easily provided if the work is protected under the federal copyright statute.

7. The subdivision of ownership rights would be more readily recognized under the statute than at common law.

8. If an uncopyrighted program should become "published," all rights are lost forever.

The disadvantages of copyright under the federal statute follow:

1. The list of types or classes of educational materials which is protectable under the statute is limited to the thirteen categories listed above (infra p.). Unless the material fits within one of the categories, it is not copyrightable. For example, sound recordings and audio tapes are not protectable under the statute.

2. The formal requirements for protection under the statute can be onerous. Registration forms must be filled out, fees must be paid, notice of copyright must be attached to the work, and finally copies must be deposited with the Copyright Office.( )

( ). The Librarian of Congress will enter into a "Motion Picture Agreement" with any copyright proprietor providing for:
(1) Two copies of each motion picture deposited for copyright registration will be returned to the copyright proprietor.
(2) During the two-year period following the return of the two copies, the proprietor must at all times keep in its custody or control one "good" copy of the motion picture.
(3) Upon request by the Librarian of Congress at any time within such two-year period the proprietor must immediately deliver to the Library one copy of such motion picture, of such quality and condition as the Library deems satisfactory, to be "printed on first-quality film, complete, clean, and in good usable condition."

---

3. Protection under the statute is limited to 28 years, and with a formal renewal for an additional 28 years. Common law protection is perpetual as long as the work is neither published nor registered in the Copyright Office.

4. The copyright owner under the statute has a more limited right to control the uses of his copyrighted work under the statute than under the common law. The common law does not recognize the doctrine of "fair use" nor does it permit the "not-for-profit" performance of types of material specified by the statute.

Summary and recommendation.

An analysis of the operation of both common law and statutory copyright as applied to educational materials prepared for the new media leads to the following recommendations:

1. Supplementary materials such as outlines and study guides can readily and simply be copyrighted as a "book." In some cases the copyright of the supplementary material may protect those programs which are dependent for their proper use on such materials.

2. Most educational programs can be adequately protected under the common law provided they are not "published" under the technical definition of that word. Performance or exhibition does not constitute publication, but duplication and distribution may.

3. Unless the owner wishes to reproduce copies of his program for direct sale or license to outsiders, statutory copyright is not necessary although there is some authority to the contrary. In any case the owner of the material should weigh the advantages and disadvantages of both common law protection and statutory protection, and with the assistance of an attorney decide which type of protection is the more desirable for the particular educational material under consideration.

4. Moral and Neighboring Rights in Educational Programs.

The educator who participates in the production of an educational program for one of the new media may act in several capacities; he may plan the program or series of programs, he may write the script, he may organize the supplementary material, he may select the various props, and he may appear in front of the camera.

Previously in this Report it has been pointed out that the author, creator or inventor is the original owner of his creation, but that this original ownership is sometimes divided among a group of participants, and in the case of educational programs the original ownership has been transferred by expressed or implied terms of employment to the educational institution under whose auspices the program was produced.

Even though the legal title to the program may be in an educational institution or in a corporate enterprise, the teacher as creator, author or performer has a serious interest in the program and in its future use. These various interests of the author-artist-creator have been grouped under the term "moral rights."

The principles of copyright protection as developed in the Anglo-American legal system have not been as hospitable to the suggestion that authors, artists and performers should retain special rights as have several of the European legal systems, particularly the French and the German. As Mr. William Strauss, in his copyright law revision study, points out: "It is frequently said abroad that the 'moral right' of the author, i.e., the right to safeguard his artistic reputation--as distinguished from the property aspects of his copyright--is not sufficiently protected in the law of the United States."( ) Even American lawyers have expressed this opinion. The

---

( ). "The Moral Right of the Author," Study No. 4, Copyright Law Revision, Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S.Senate, 86th Congress, first Session, Government Printing Office, 1960. Much of the following discussion is taken from this report.

alleged non-existence of protection of the author's moral right has been considered one of the principal obstacles to the adherence by the United States to the Berne and Washington copyright conventions, both of which contain provisions for the protection of the right of the author to claim authorship in his work and to prevent others from interfering with its integrity.

The moral right of an author as provided for under European law and under international conventions contains two main components: (1) the paternity right and (2) the right to the integrity of the work. The paternity right consists of the right to be made known to the public as the creator of his work, to prevent others from usurping his work by naming another person as the author, and to prevent others from wrongfully attributing to him a work he has not written. For example, the French courts have ruled that under this right the author's name must appear on the work without change even after sale of the work and that, in the case of several authors, all names must appear.

The right to the integrity of the work includes the right to prevent all deformations of his work and to be entitled to make changes in the work or to authorize others to do so. In France, co-authors must mutually agree on changes, otherwise the courts will decide. Also the user of a work in a performance must adhere strictly to the form and contents given the work by the author.

Great Britain continues to get along without an official recognition of "moral rights" of an author and Canada, although it

has a statute,( ) also seems to rely upon the common law and upon contractual arrangements.

( ). Canadian Copyright Act, Chap. 32, RSC 1927 as amended. Under Sec. 12(5) the author has the right "to claim authorship of the work, as well as the right to restrain any distortion, mutilation, or other modification of the said work which would be prejudicial to his honour or reputation." This language has been criticized as being "conceived in vagueness, poorly drafted, sententious in utterance, and useless in practical application." Fox, U. of Toronto L.J. 1945/6, p. 126.

The doctrine of moral rights as adopted in Germany and France has no direct counterpart in the United States, nor do our statutes provide for the protection of the personal rights of authors as a class. However, the American courts have by common law and by interpretation of express and implied contracts between the author and publisher or assignee recognized many of the personal rights of authors.

On the problem of paternity right, the French courts have recognized the right of an author to have his name appear in connection with the contractual use of his work in the absence of a waiver. Where a contribution has been made to a composite work, or where the work is a group product, the courts have recognized a presumption of waiver of the paternity of authorship rights if not expressly reserved. This means that a group of educators working on an educational television program would be presumed to have transferred all rights of authorship unless such rights are expressly reserved by contract or stipulation.

The Copyright Office Study No. 4 reports that the "use of an author's name in a distortion of his work, a false attribution of authorship, and the unauthorized disclosure of an author's name have been held to be torts under the law of libel, unfair competition, or the right of privacy." (p. 132).

The author's right to prohibit changes made by others is usually based in the United States on whether the contract permits such changes. Authors should therefore make express provisions for such changes in any transfer or assignment of original copyright. However, any changes that are necessary for the technical production of adaptation of the work are usually permitted.

The Copyright Office also reports that there is no provision in the United States copyright statute nor has any court decision been found permitting an author to withdraw his work from circulation after it has been published.

Neighboring or performer's rights.

For the purposes of a discussion of neighboring rights, it is necessary to look at the teacher who appears in a motion picture, kinescope or videotape or whose voice is recorded as a "performer."

What rights does a performer have over the recorded form of his performance? Under the federal copyright statute, the rights of the performer, whatever they are, are not mentioned and therefore not protected. To an uncertain degree the rights of performers are protected under common law, particularly by the rules of unfair competition and the right of privacy. The Copyright Law Revision

Studies produced by the Copyright Office make no recommendation for the protection of the rights of the performer.

The rights of the performer under the present system are determined by negotiation between the performer and the person or organization which produces the recording. What rights the performer has to control his rendition is, therefore, determined by the terms of the contract or agreement into which he has entered. The more specific the provisions of this agreement in terms of his compensation and rights, the more protection the performer has.

Because the protection of a performer or artist's rights is determined by negotiation, a number of organizations have been established to help the performer protect his interests in his negotiation. For example, The American Federation of Television and Radio Artists has developed a code of fair practice which becomes a part of the agreement between the performer and the producers. Performing musicians have available a minimum basic contract negotiated by the American Federation of Musicians (AFM) or the Musicians Guild of America (MGA).

In this section we are not discussing "performing rights" which are the rights of the author of a work to control the public performance of his work but the rights of the performers themselves as separate from the rights of the author, composer or creator. In the case of the performing teacher, he should be protected by an agreement, preferably written, with his employer, specifying the use to be made of the recorded educational program, the length of time that the recording can be used, some equitable provision for determining

when and what revisions need to be made in the program, and at whose cost. All of these details should be agreed upon by the teacher and the producer in advance of the actual production of the educational program.

5. Summary and Recommendations.

Normally the production of an educational program for one of the new media, particularly for motion pictures and recorded television programs, involves a large number of persons each of whom contributes toward the final product. In an educational program, the teacher is probably the most important person on the production team.

Under present practices in the educational field, the ownership of the final program is usually in an educational institution or other type of non-profit organization. This is particularly true for motion pictures and radio and television programs, but is not currently the practice in regard to auto-instructional devices and programed learning which are largely the products of commercial institutions.

The educational program producer and the teacher should have a firm and definite contract or agreement specifying not only the form and type of compensation but also the "reserved rights" of the teacher, such as future use of the recorded programs, arrangements for withdrawal of the program and for its revision, and use and disposal of the program in the event of the death of the teacher or his resignation from the employ of the producing institution.

Part II
Restrictions on the Use of Program Materials in the New Educational Media

The production of any educational presentation, as every teacher knows, utilizes materials from many sources. Every teacher and every scholar is a borrower and an adaptor, and no educational program is so original that it does not rely upon resources developed by others. Sound public policy and sound educational policy accept this borrowing and adapting as essential to the development of educational materials.

On the other hand, each creative individual who prepares material which others may use should to some degree retain ownership and reap the benefits of his creation and his contribution. This concept becomes particularly important in those areas where sizeable financial returns are available. If there is profit to be made from the creation of materials used for educational purposes, wi should not the creator and originator of these materials participate in this profit?

This part of the study is an attempt to delineate what materials may be used in the construction of educational programs and what materials are restricted from such use because of legally recognized ownership in others.

Three areas of the law become involved in the use of materials originated by others in the construction of educational programs: (1) the common law of literary property (sometimes referred to as common law copyright), (2) statutory copyright, and (3) the right

of privacy. The first two remedies establish property rights in such materials as (1) literary materials, (2) dramatic materials, (3) music, and (4) visual materials. The third remedy, right of privacy, seeks to determine the use of persons, their names and their pictures in connection with educational programs.

The following discussion is subdivided under the following headings:

(1) Restrictions on the use of literary materials;

(2) Restrictions on the use of dramatic materials;

(3) Restrictions on the use of music;

(4) Restrictions on the use of visual materials;

(5) Recordings and transcriptions;

(6) Restrictions on the use of persons, their names and pictures.

1. Restrictions on the Use of "Literary" Materials.

Practically every educational program, whether prepared for the older media such as textbooks or the newer media such as television, utilizes literary material originated and prepared by others. What are the legal limitations on this practice of borrowing and utilization? These limitations are discussed under the general headings of (1) common law copyright, and (2) statutory copyright.

Literary materials include all types of resources using words as the method of communication with the exception of "dramatic" literary materials. Literary materials as used in this section include such common sources as manuscripts, books, poems, essays,

lectures, literary articles, and all types of written and printed materials (except dramatic). Dramatic materials are treated in a separate section because the law provides for a different cluster of ownership rights for this area.

Although the law recognizes restrictions on the use of various types of resources, there is one area which is completely unprotected. Ideas (except as they may be patentable) are free to all subsequent users. The law accepts the proposition that sound public policy requires the free and open dissemination and utilization of ideas, and that the originator of an idea, no matter how great his contribution to society, should not have a monopoly on the use of the idea. Themes, concepts, plots, systems of organization are all in the realm of ideas and may be freely used by others. It is only when these themes, concepts, plots or systems are embodied in a particular format that these formats are protectable and require permission for their use.

Restrictions on use of unpublished material.

A large body of literary material which might be utilized in the construction of an educational program is restricted by the common law protection for literary property, frequently referred to as common law copyright. All unpublished literary material should be cleared before using; that is, permission should be obtained from the owner of the unpublished writing before it is made a part of an educational program. As a practical matter, the literary materials used in a program usually come from "published" sources (which follow different rules), but scholars in particular make frequent use of unpublished manuscript materials.

Unpublished literary material usually carried no notice of any kind warning the teacher against its use, and under the common law no notice is required. If the material is unpublished, the user should be on his guard and, if possible, should request permission for its use. Fortunately, most unpublished literary materials in public depositories are placed there for general free use without the requirement of special permission, but unpublished materials from private sources should be checked for clearance.

The common law protection for unpublished literary material exists only so long as the material remains unpublished. As soon as publication takes place, the material becomes available for free use unless the owner has taken steps to copyright the material under the federal Copyright Act.

Under what circumstances is literary material "unpublished" so that it is protectable by the common law against unauthorized use? "Published" is a complicated and sometimes confusing legal concept and may vary in its definition with different types of materials. For example, "publication" is different for musical works than for literary works. Generally, publication which destroys the common law ownership takes place when the literary work is duplicated in some form and made generally available to the public. If a work is printed or duplicated in a number of copies and offered for general distribution, it can be presumed that it is published. As a published work, it can be freely used in any way - even duplicated unless it has been copyrighted and carries a notice of copyright. Otherwise the work is in the public domain.

For example, a soldier in the Civil War writes a series of letters and a diary describing one of the important battles. The letters and diary are in the possession of his descendants, but are made available to a historian who prepares a dramatization of the battle. Without the permission of the descendants of the soldier, the historian could not use the materials, and his use is controlled by the owner of the manuscript.

Use of copyrighted material.

After publication, literary materials except for a small class of works( ) must be copyrighted if the owner is to control the subsequent use of the material. Even after copyright has been secured, the law allows certain types of use without the consent of the copyright owner.

( ). The Copyright Act (Title 17, U.S.C. Sec. 12) permits the copyright of certain unpublished works not reproduced for sale such as a lecture or similar production, a dramatic or musical, or dramatico-musical composition, motion pictures and photographs.

Neither the Constitution of the United States nor the copyright statute grants to the copyright owner unlimited control of his protected work. The theory of copyright is that it grants certain types of control for a limited period of time while at the same time the law permits certain uses to be made of the copyrighted material. In spite of the fact that the work is marked "Copyright," complete use can be made of the material after 28 years from the registration of the copyright unless renewed for a second period of 28 years. In any case, a copyright which is more than 56 years old is no longer valid.

What use may educators make of copyrighted materials in the production of programs for the new media? The most important exception in favor of use by educators of copyrighted literary materials is the right to present such materials over radio or television so long as the presentation is "not-for-profit."( ) This general per-

( ). Ibid. sec. 1(c).

mission to use copyrighted materials on the air applies to all types of literary materials except dramatic works. A not-for-profit educational station may read a copyrighted contemporary novel on the air in its entirety without the consent of the copyright owner, but the same station may not present a play or dramatico-musical production without first getting permission and paying whatever royalties are negotiated. It is obvious that if the entire literary work can be presented, selected excerpts and parts may be used.

The use of literary materials described above would be the same whether the educational program was distributed by closed circuit or broadcast to the public at large, as long as the operation is "not-for-profit."

What is a not-for-profit use? This can become a particularly sticky question under some circumstances. The determining characteristic is not whether the material is educational but whether it is used in a profit-making situation. A radio station operated by a public school system where the finances are drawn entirely from taxes or contributions is a not-for-profit operation. A public college or

university which operates a television station on funds from the general budget of the institution would be considered a not-for-profit operation. The same would apply to an ETV station supported by public funds or subscription. Questions might arise however, if the broadcast station were operated by a profit-making educational institution, or if paid advertisements or other commercial announcements were carried by the station.

From the above, it can be deduced that although the educational program which uses copyrighted literary materials can be legitimately presented on an educational station or on closed circuit, this same program cannot be presented on a commercial station without clearance for all copyrighted materials.

For original or re-play use on commercial stations, educational programs utilizing copyrighted literary materials must rely either upon clearance permission from the copyright owner or upon the legal doctrine of "fair use."

Fair use.

Fair use is a legal doctrine not to be found in the Copyright Act but adopted by the courts in order to alleviate the limited monopoly which copyright protection gives the owner. So far the court cases have not differentiated the fair use of copyrighted materials by educational media from use by the purely commercial media. Therefore, the fair use of protected material in educational programs would be the same for educational broadcast stations, closed-circuit operations, and commercial outlets.

Fair use is difficult to define. Its meaning can only be deduced from an analysis of court cases, some of which are quite confusing. Where the doctrine of fair use permits the use of restricted material, there is no infringement of copyright. Statements by copyright proprietors in the copyrighted work that no use whatsoever can be made of the subsequent material are, of course, unenforceable and inconsistent with the doctrine of fair use. So also are such restrictions as limiting quotation to 50 or 200 or any prescribed number of words. Equally unenforceable are warnings that the only use of the copyrighted material permitted by the owner is for reviews, criticism or news items.

A brief summary of what the courts have considered fair use of restricted literary material follows:

(1). Incidental use. A reasonable amount of material can be used incidentally or as a background in a new work. Quotations can be made on an educational television program from a copyrighted book or magazine article. One of the tests applied is whether the use made of the copyrighted work tends to lessen the commercial sale of the original work.

(2). Review and criticism. Excerpts and quotations can always be used in serious criticism. Reviews are considered an important and proper exercise of fair use and critics may quote extensively for the purpose of illustration and comment.

(3). Parody and burlesque. While a competitive version of a copyrighted work may be an infringement, mimicry in good faith no

matter how devastating is considered fair use. The line here is difficult to draw. Jack Benny's television parody of the movie "Gaslight" was held to be an infringement because plot, lines and characters were copied to some extent.( ) On the other hand, Sid

( ). Loew's v. CBS, 131 F.Supp. 165 (S.D.Cal. 1955); affirmed 239 F.2d 532 (9th Circ. 1956); noted in 23 Mo. Law Review 80 (1958); affirmed 356 U.S. 43 (1958); noted in 56 Mich. Law Review 1355 (1958).

Caesar's parody of "From Here To Eternity" was held by the same court to be fair use in mimicry although the plot and some of the lines were used.( )

( ). Columbia Pictures Corp. v. NBC, 137 F.Supp. 348 (S.D.Cal. 1955).

(4). Scholarly works and compilations. An earlier work can be used collaterally but not substantially copied. Since scholarly work often consists of reading, analyzing and quoting from prior works, there appears to be more latitude in this area than in non-scholarly works. The same latitude is not permitted if a scholarly work is used for non-scholarly purposes.( )

( ). Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F.Supp1 302 (E.D.Pa. 1938).

(5). Use for non-profit purposes. No clear-cut cases have decided that a use for an educational not-for-profit purpose is within the doctrine of fair use, but on the other hand, it is fair to say that fair use is wider in situations where the commercial element is absent.

In summary, fair use is a doctrine which defies precise definition, but it can be described by its outer limits and its rationale. Some of the factors which have been taken into consideration by the courts in determining whether there is fair use of restricted material are: (1) type of use, (2) intent, (3) effect of use on demand for the original, (4) benefit derived by the user, (5) amount of user's labor, (6) nature of the work, (7) quantity of the work taken, (8) relative value of the part taken, and (9) whether the work competes commercially with the original.

Finally, it should be pointed out that fair use apparently applies only to material copyrighted under the federal statute and does not extent to the use of unpublished literary material protected by the common law.

Dramatizations of literary materials.

The Copyright Act gives the copyright owner the exclusive right to make dramatizations of his non-dramatic literary work. (Sec. 1(b)). As we shall see in the next section, the use of copyrighted dramatic materials is more restricted than is the use of other types of literary works. To what extent then may an educational program on the new media include a dramatization or other use of a non-dramatic story?

It is quite clear that even on an educational non-profit program a producer has no right to dramatize a copyrighted novel or short story without the author's consent. The next question is what is a dramatization? The production of a play taken from a novel with scenery, characters and stage direction would be considered a

dramatization. A reading of a novel in a dramatic manner either by one voice or by several voices without scenery or stage business would probably not be considered a dramatization and could be presented on a not-for-profit basis without consent of the copyright owner.

Use of government publications.

What use can be made on educational programs of government publications, both national and state? The Copyright Act provides (Sec. 8) that no copyright shall subsist in "any publication of the United States Government, or any reprint, in whole or in part, thereof." "Publication" would seem to include government-produced charts and maps. Most federal government publications carry no copyright restriction and, therefore, are open to full use on educational as well as non-educational media. However, the government through its publishing facilities sometimes issues literary works with notice of copyright. Whether this procedure is proper is a controversial issue which has become increasingly important as the government through its employees or contractors produces valuable information particularly in scientific and technical fields. The present situation seems to be that material produced by a government employee in the course of his employment is not copyrightable, but that material produced by this same employee outside the regular terms of his employment may be copyrighted.

There is no restriction on the ability of the various states to protect their literary works through copyright. But the published reports of official judicial, legislative, or administrative proceedings of both state and federal governments are available for complete use.

2. Restrictions on the Use of Dramatic Materials.

A special category of dramatic literature is made for the purposes ot his study because copyright theory provides for a special cluster of ownership rights for the author of a drama.

First, although a play may be reproduced in copies without copyright for the purpose of presenting performances, this type of distribution does not in the eyes of the law constitute "publication" sc as to place the play in the public domain. A play to be in the public domain must be generally available for distribution, not just for performance.

Secondly, although a play may be performed before millions on commercial television, it does not thereby lose its common law rights of ownership if not reproduced in copies for sale or license. In other words "performance," no matter how wide, does not constitute publication.

A copyrighted and published play also has some characteristics different from those of non-dramatic literary works. In copyright theory, a play is created to be performed, and therefore the author is protected against unauthorized performance of his work.

Educational media must follow the same rules as commercial media in the clearance of dramatic materials. Whereas a not-for-profit operation can present copyrighted lectures, sermons, novels and other non-dramatic literature without the permission of the copyright owner, this same privilege does not extend to dramatic works. In all cases whether the program is on radio, on broadcast television,

or on closed circuit, permission for performance must be obtained from the copyright owner.

Can an educational program contain "readings" from a copyrighted play without clearance? The Copyright Act (Sec. 1(d)) provides that the author or copyright owner has the exclusive right "to perform or represent the copyrighted work publicly." It is quite clear what is a performance, but there have been no court cases explaining what is meant by "represent." It probably would be safe to assume that short readings from a copyrighted play would not violate the rights of ownership. And here again as in the case of non-dramatic literature, "fair use" would permit some examples of the genre of the play by acting out short segments. Whether a reading of an entire play as distinguished from a performance which would include settings, characters, and costumes would be possible for a not-for-profit medium has not been decided.

Some educational operations may be able to take advantage of the provision of the copyright law which gives the author of a drama the right of performance only when that performance is "public." The inference is that if the performance is private, no permission need be obtained. When is a performance public? The answer is when it is available to the general public. A performance in a restricted classroom or on closed circuit to a restricted audience would not be such a performance as to require clearance.

As will be shown in the following section, restrictions on the use of copyrighted music are the same as for <u>non-dramatic</u> literature,

but dramatico-musical compositions follow the rules of drama rather than of music. An opera, operetta or musical comedy may not be performed on an educational medium without the consent of the copyright owner.

3. Restrictions on the Use of Music

The right of the composer of music to control the use of his creation is similar in some respects to the right of the author of a literary work, and in other respects it is similar to the right of the dramatist. To turn the statement around, the uses which an educational medium may make of musical materials are somewhat like the uses it may make of literary works and somewhat like the uses made of dramas.

Unpublished music receives the same protection at common law as drama, but its protection under statutory copyright is different. A piece of music which is not reproduced in copies for general dissemination like a literary work is not published, and anyone, including an educational medium which has access to it, is prohibited from using it. The rule for determining when a piece of music is published so as to lose its common law rights is the same as that for dramas. Performance of the music no matter how wide does not destroy the exclusive property right of the composer. This is the result of a series of court decisions holding that under no circumstances is performance of either a drama or a piece of music "publication." To be published, music must be duplicated in visual copies and offered for sale or general distribution.

Educational media should be warned that special permission must be obtained to use unpublished music on educational programs, and that the wide performance of the music does not eliminate the necessity for such permission. If the music is printed, it is fair to assume that it is published, and unless it carries a copyright notice, the music is in the public domain.

However, most music which comes to the attention of the general public is copyrighted under the federal statute. The rights of the composer or his assigns to control the use of copyrighted music are different from those of the playwright but similar to those of the author of non-dramatic literature.

The composer or owner of copyrighted music has complete control over the printing and sale of his work, but he has only limited control over its performance. Obviously, when a musician buys a sheet of music, he buys with the sheet the privilege of performing the music. However, the Copyright Act (Sec. 1(e)) limits such privilege of performance to private performances or public performances not for profit.

Under this provision of the copyright law, the public not-for-profit performance by an educational medium of a copyrighted piece of music is permitted without special authorization from the composer or his publisher. Here again as in the case of literary works, the question arises as to what is a public and not-for-profit performance? The rules for determining this question are similar in both cases. An in-school closed-circuit broadcast would not be either a public performance or a performance for profit. A broadcast of a piece of

music on an educational radio or television station which accepted no revenues except taxes and contributions would be "public," but it would not be for profit, and therefore no permission would have to be obtained and no royalties paid.

One further caveat. The copyright owner of a piece of music not only retains the right to make copies but also has the exclusive right to make or license the making of arrangements.

Published music like literary works is subject to "fair use," but the legal precedent for determining what is fair use of music is sparse. It has been held that the incidental use of song lyrics in a literary work is fair use.( ) It cannot be assumed from this that the incidental use of copyrighted music on educational radio or television in a for-profit situation is permissible.

( ). Karll v. Curtis Publ. Co., 39 F.Supp. 836 (E.D.Wis. 1941); noted in 15 So.Cal. Law Review 249 (1942); Broadway Music Corp v. F-R Publ. Corp., 31 F.Supp. 816 (S.D.N.Y. 1940).

The problems of recording music for the educational media are discussed in Section 5 below.

4. Restrictions on the Use of Visual Materials.

Educational programs, particularly in the new media, make extensive use of all types of visual materials such as pictures, maps, charts, film strips, and motion picture films. To what extent may such materials be freely used by the educational media and in what circumstances must permission of the owner be obtained before use?

Visual materials may be either (1) uncopyrighted or (2) copyrighted. If uncopyrighted they may be either (1) unpublished or (2) published. An unpublished uncopyrighted visual aid may <u>not</u> be used without the permission of the owner. An uncopyrighted published visual aid is in the public domain, and educational media as well as others may make full use of it. The problem here as in the case of literary materials, drama, and music is when is the material published? The rule here is the same as for literary works; if the item has been duplicated and offered either for sale or for general distribution, it is published and open to all. If the material is offered for general sale and does not carry a copyright notice, it can generally be assumed it is published and open to general use.

Copyrighted visual materials may <u>not</u> be copied for general educational purposes without the consent of the owner, subject to the limitations of "fair use." Let us take a copyrighted photograph as an example. No one may make copies of this photograph even on a not-for-profit educational basis. Certain restricted uses, however, can be made of this photograph. For instance, it can be displayed, shown to a class of students, shown to a general audience for review, comment and criticism. These uses would be considered "fair." A little more difficult is the problem of whether this photograph could be shown on closed-circuit television to classes of students, but I am inclined to think the courts would consider this, too, fair use. Still more difficult is the problem of whether this copyrighted photograph can be shown on a general educational broadcast. Here, too, the use

seems to come under the doctrine of "fair use." The most difficult problem arises when the photograph is duplicated on film, and a number of copies of this film made available for general distribution. In this latter case, permission should be obtained from the copyright owner.

It also seems clear that on both television and film, the use of copyrighted visual materials such as photographs as background or incidental setting would not be considered a violation of the rights of the owner. It should also be noted that a picture in a copyrighted book may also be protected by the general copyright on the work without having a special copyright notice on the picture. One further note--the Copyright Act does not contain any provision allowing the use of copyrighted visuals in a not-for-profit situation. In all cases, the educational media must rely on the doctrine of fair use in the absence of special permission.

A motion picture film is in a slightly different position from other types of visual aids. The copyright owner of a film has the exclusive right to "perform" the film, and any unauthorized performance is a violation of copyright. To what extent may a copyrighted film be incorporated in whole or in part in an educational program? First, to incorporate the film as a whole would be a violation of the film-owner's rights. How much of the film could be used and in what manner depend on the interpretation of the doctrine of "fair use." Undoubtedly educational uses would be more likely to be considered "fair" than commercial competitive uses, but even here the use is restricted to excerpts as examples mainly for comment and criticism.

Maps and charts pose a special problem for the educator. Maps and charts are copyrightable under the Copyright Act (Sec. 5(f) and 5(i)). What use can be made of a copyrighted map? We are accustomed to the situation where the teacher displays a map in his classroom for instructional purposes, and this use although not specifically sanctioned by the courts, has not been considered a violation of the rights of the copyright owner. Does the came principle apply when the map is distributed by closed circuit or broadcast television, and more particularly when the educational program using the map is placed on film, kinescope or videotape? The law prohibits "copying" the map. Is the reception of the map on a television set "copying?" Probably not. But the problem of recording the map on a film is more complicated, and it and the related problem of recording other types of visual materials are discussed in Sec. 5 below.

Charts and graphs are a special problem. These are copyrightable as such under the federal statute when they convey information in the form of diagrams or line drawings. Unpublished charts and graphs are protected by the common law, but after publication the producer of a chart or graph has no copyright protection unless he can qualify his production as a "drawing" or as a "photograph." As a drawing, the chart would have to show either some originality or some artistic characteristics.

Even though the chart or graph may be incorporated in a copyrighted book, the general copyright would not extend to items which in their original and separate form were not copyrightable under the statute.

In any event, an educator can make use of the information in the chart or graph and in most cases can copy the format for educational purposes.

5. Recordings and Transcriptions.

The permissible use of protected literary, dramatic, musical and visual materials on educational programs for the new media as described above is fairly clear, but so far we have been discussing the single, direct, one-shot use. Much more complex is the problem of recording and transcription of educational programs in such form that they can be preserved and reused, exchanged, leased, or sold. Unfortunately, neither the federal statute nor the judicial decisions are completely clear on the right to record. It will take several changes in the Copyright Act or a clear-cut court decision to finally settle the problem. The following discussion attempts to give the educational media the best judgment of our research team on recordings, keeping in mind that some legal authorities may disagree with the conclusions.

First of all, as we have shown in Part I of this study, a sound recording is not copyrightable under the federal statute. Recommendations that the Copyright Act be changed by amending legislation have been made, but the Copyright Office, although recognizing the validity of the principle that sound recordings should be protected, recommends that further study be made of the problem before specific amendments are adopted by Congress.

Secondly, at least some types of visual recordings are copyrightable under the recognized categories of "motion pictures." If the

recording can be recognizable as a film, it can be copyrighted. Under this principle, a kinescope which bears a resemblance to a film can be copyrighted, but it is not completely clear that a videotape or other types of magnetic tapes can be protected under the federal statute. (See Part I).

The right to record educational programs by the new media rests on (1) two sections of the Copyright Act referring to literary works (Sec. 1(c)), and music (Sec. 1(e)); and (2) on the use which is made of such recordings.

Although the "not-for-profit" exemption does not appear in the particular phrases of the Copyright Act which restrict recording rights, the presence of this phrase in both the preceding and the succeeding clauses would lead to the conclusion that educational media may make recordings of copyrighted literary and musical materials on a not-for-profit basis depending somewhat on the subsequent use made of these recordings.

This recording section as set out in Sec. 1(c) reads:

The copyright owner has exclusive right...."To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other non-dramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever."

It is submitted that this section and the subsequent section referring to music permit the making of transcriptions and recordings for a not-for-profit purpose. A review of the legislative history of the above recording provision which was adopted in 1952 tends to confirm this recommendation.

The right to make a recording is one thing; the use to which this recording may be put is another. It seems clear that a recording of copyrighted material may be made for record and also for delayed broadcast on a single use. More controversial is whether a recording may be re-used on the originating station, and still more unclear is whether this recording can be exchanged with other stations or sold or leased to other users.

If the educational program is used exclusively on educational closed-circuit, it is submitted that recordings of copyrighted literary and musical materials utilized on a not-for-profit basis can be re-used. It would also seem that these recordings could be exchanged with other not-for-profit educational operations. It is completely unclear whether such recordings could be leased or sold to other closed-circuit operations. The result might depend on whether the sale or lease was negotiated for an amount designed to cover only the original production and distribution costs.

It is completely clear that a recording of copyrighted material

in an educational program cannot be sold on the commercial market without clearance from the original copyright owners of the literary, dramatic and musical materials.

Further, if the copyrighted musical (and only musical) material has already been recorded by some other source with the consent of the copyright owner, phonograph re-recordings but not sound tracks can be made under the "compulsory licensing provision" of the Copyright Act (Sec. 1(e)) upon the payment of two cents per copy.

Summary--Until the copyright statute is amended or until the courts make a clear-cut decision, it is submitted that educational not-for-profit programs can be recorded and that non-commercial [illegible] of these recordings and transcriptions is permissible. However, a national distributing agency may have different problems in making recordings and in some cases different practices might be desirable.

6. Restrictions on the Use of Persons, their Names and Pictures.

In this section we leave the field of copyright temporarily and enter the field of the law of privacy. What are the rights of an individual to withhold his person, his name, or his photograph from use by the educational media?

The law of privacy is of relatively recent origin and like copyright is based both upon common law or on special statutes. However, unlike copyright, the right of privacy is under the

jurisdiction of the various states and not the federal government, and again unlike copyright, statutory and common law privacy are not necessarily mutually exclusive.

The principal purpose of the law of privacy is to protect the individual from the unwarranted and commercial use of his name and picture. Only a few states have enacted legislation on the right of privacy, but because New York is one of these states and because New York is such an important educational and commercial center, the effect of the New York legislation has been nationwide. In most other states the right is recognized only in the common law as expounded in judicial decisions.

The right of privacy is a complex of four elements: (1) intrusion upon the individual's seclusion or solitude or into his private affairs, (2) public disclosure of embarrassing private facts about the individual, (3) publicity which places the individual in a false light in the public eye, and (4) appropriation of the individual's name or likeness for the appropriator's commercial advantage.( )

( ). William L. Prosser, 48 Calif. L ▪ Review, 383, 389.

To determine the limits of the right of privacy requires the exercise of a nice discrimination between the private right to be left alone and the public right to news and information; there must be a weighing of private interest as against public interest.( ) Most of the cases

---

( ). Carlisle v. Fawcett Publications, Inc., 20 Cal. Rptr. 405.

---

which recognize the right of privacy involve some degree of commercial use of an individual's name or picture.

The educational media run into the law of privacy in situations where they use incidental personnel in the production of their programs. A televised classroom with students present as a part of the picture would present such a case. The use of the teacher's name and picture on advertising or promotion of the educational program would be another such situation.

Normally educational programs produced on a non-profit basis would not be deeply concerned over the law of the right of privacy. It can be assumed that when a teacher agrees to participate in the production of a program, he agrees to the use of his name and likeness. However, if the teacher's name and picture are to be used in advertising and promotions, especially where the program is to be presented on a commercial basis, a formal release for such use should be obtained.

Another hazard is that, although originally produced for non-profit educational purposes, a recorded program in the form of a film, kinescope or videotape might possibly be used for other purposes. In this case, again, a formal release should be obtained from the participants or such use should be specified in the contract for employment.

A perplexing problem arises with the use of children as subjects or as part of a class in a recorded educational program. Must a release be obtained from the parents of children who appear as part of the educational situation? Ordinarily, such a release is not necessary, although at times good public relations might dictate the advisability

of obtaining such a release. However, under special situations it is necessary to obtain a release from the parents. These occur when a child is made to appear against his objection, or where the child is shown in an embarrassing situation, or where the child has some defect which becomes apparent in the program. Under no circumstances should the teacher seek to embarrass the child by showing up his mental or physical deficiencies. If the type of program requires this kind of demonstration, a release should be obtained from the parents.

Another example - if Junior is singled out in a class and interrogated so as to make him cry and is told in a harsh manner while he is crying how stupid he is, Junior's right of privacy is probably invaded if the program is shown on one of the educational media.

Also, a student should not be made to appear to hold opinions he does not hold. An atheist should not be shown as part of a praying group or vice versa. And no one should be made to appear to be a Communist or a Communist sympathizer. Details of the student's private life should not be brought out, nor should he be questioned about a humiliating illness.

All of the above, of course, is just good educational and professional ethics. In most educational situations the right of privacy is not involved and no releases are necessary.

The New York statute prohibits the use of a person's name or picture for "advertising or purposes of trade." In New York and states like New York, no release is necessary for participants in an educational program unless it is expected that the individual's name or likeness will be used for advertising purposes.

Part III
Rights and Compensation of Teachers( )in Educational Programs for the New Media

---

( ). The term "teacher" as used in this section refers to instructors of all levels, including elementary, secondary, and higher education. The elementary teacher and the university professor may vary somewhat in the specificity of the terms of employment, or as the professor prefers to call it, the terms of appointment. Whether "employment" or "appointment," the problems are the same.

At the present time the teacher is not ordinarily called upon as part of his duties to plan, organize, direct or appear in person in an educational program prepared for one of the new media such as motion pictures, radio or television. However, each year an increasing number of educational institutions are producing such programs and are asking teachers to contribute their knowledge, talents and professional skills in this effort.

This section of the Report will take up some of the problems arising from the participation by teachers in the development and production of these new and potentially effective educational tools. Among such problems are: (1) methods if selecting a teacher for the new media programs; (2) the teacher's relationship to a production group; (3) the teacher's compensation; (4) the teacher's control of re-use and distribution of the program; (5) supplementary instructional materials; (6) methods and procedures for establishing the teacher's rights.

The procedure in discussing each group of problems will be to

attempt to describe current practices in each area, give some comments on these practices, and where possible, present some recommendations or guide lines for the future. The description of current practices is based on the returns to a twenty-three item questionnaire which was sent to 895 educational institutions or program-producing units, of which 642 were colleges or universities, 174 were elementary or secondary schools and school systems which were known to have engaged in the production of educational programs for the new media, 22 were state or regional ETV councils, and 57 were ETV stations producing elementary and secondary school programs. Returns were received from 482 or 75 per cent of the colleges and universities, 110 from elementary and secondary schools or school systems, and 17 state or regional systems, 22 ETV stations, and one independent producer. The study was empirically oriented, and no attempt was made to produce a scientific sample. Most of the questions were open-ended although designed for statistical compilation. It may be assumed that the results indicated for the medium of television are indeed representative of practices today in American schools. A copy of the questionnaire is attached to this Report in Appendix C.

It should be noted that elementary and secondary schools have, in general, given more thought to and established more policies concerning the rights and responsibilities of their teachers using the new media than have colleges and universities. This is probably due to the inherent qualities of most public school systems, particularly their needs for tighter administrative control and more rigid pay scales,

not to mention budgetary problems. On the other hand, colleges and universities have led the way in experimentation and development of different uses for the new educational media.

1. Methods of Selecting a Teacher for New Media Programs.

The new media programs, whether they are prepared for television, motion pictures, radio, auto-instructional devices (programed learning) or for other types of audio-visual presentation, are produced for several purposes. Among these are (1) systematic instruction either for credit or non-credit, (2) general and cultural education (enrichment), (3) research and experimentation, (4) observation of classes and teacher training, and (5) preservation in archives for later research.

The first two purposes listed above, systematic instruction and cultural education, account for almost all of the television programs currently being produced by educational institutions. On the other hand, educational radio programs are designed primarily for general education and enrichment. Motion picture films are again about evenly divided between the first two purposes although most colleges and universities produce film programs to fulfill grants and contracts from government or private industry sources. Auto-instructional programs are designed primarily for systematic instruction and for research.

The methods of selecting a teacher to participate in the production of these educational programs for the new media are - like

many other facets of this new venture - extremely varied, not only between but within institutions. Some producing units have well-thought-out procedures based upon experience, and others proceed in an informal and sometimes haphazard fashion. As reported in the survey, in about two-thirds of the cases in institutions of higher learning the teacher is a volunteer; only about one-third of the elementary and secondary school teachers are selected on this basis. In films, radio, and auto-instructional programing the survey reports about 70 per cent of the teachers are volunteers. In the case of television, about half the participating teachers were assigned by school or university administrators. In about 10 to 17 per cent of the cases in all college media, the contract with the teacher specified his participation in the new media programing as part of his duties; over 25 per cent of elementary and secondary school teachers are thus assigned. From this it might be assumed that in most cases the duties of the teacher who participates are not set out in a formal agreement or document. A scattering of producing units reported that the teachers were selected by a group of other teachers, or hired by a contracting agency, or hired directly by the educational television or radio station. Often a teacher is "invited" to audition for or teach a telecourse based upon his previously demonstrated abilities or familiarity with the subject matter.

Who makes the arrangements with the participating teacher? In the case of television programs in colleges and universities, negotiations and arrangements are most often made through the head of the academic

department. In some institutions the arrangement, formal or informal, is made by the TV coordinator of the university, sometimes by the director of broadcasting or the head of the station, in others directly by the producer, sometimes by the president of the college and in some cases by the public relations officer. The practices seem to be as varied as are the internal structures of American colleges, universities, and public schools. The survey indicates, however, that in over half of all instances the arrangements are made by a person serving in an administrative capacity within the institution, especially in elementary and secondary schools. About 20 per cent of the arrangements are made by the production personnel themselves, usually station managers, producers,and directors. Academic departments (those responsible for only one specific area of study in a school) make anywhere from ten to twenty per cent of the arrangements with teachers.

In radio programing in higher education, the director of broadcasting or the program producer appears to be the most common individual assigned the duty of making arrangements with the teacher. Here again the chairman of the department, the central administration, and the public relations officer appear as the negotiating units. College teachers who work on motion pictures usually make arrangements with the central administration, either through the head of the department or an academic dean, but many institutions assign this function to the producer, to public relations, or to a bureau of audio-visual instruction. Teachers working with auto-instructional devices or programed learning

usually make arrangements with the academic department or with an instructional research unit conducting experiments with programed learning. Sometimes they deal directly with a prospective publisher.

Only a small percentage of teachers in higher education give full time to the preapration of programs for the new media. A large majority of the teachers give only part time to this activity, and in the case of radio, films, and auto-instructional devices, this part time is usually in the nature of overtime or extra time. Systematic television instruction tends to require more time than most of the other media, and the returns from the survey show about 18 per cent of the teachers give full time to television instructions, some 57 per cent give part time to this activity, and about 46 per cent contribute overtime or extra time. About 75 per cent of the radio programing is done by teachers on overtime or extra time. Assignments are more rigid on the elementary and secondary level, where 60 per cent of teachers perform either on a full or part-time basis. Only 17 per cent of elementary or secondary teachers contribute their talents in an overtime or extra time manner.

From this brief summary of the current practices in selecting or assigning a teacher to participate in the production of educational programs for the new media, it is apparent that there is no common practice and that the arrangements vary with the internal structure of the institution. It is also apparent that with a variety of individuals responsible for the negotiations, it becomes increasingly desirable that within each institution some uniform patterns for

assigning teachers and making arrangements for their contributions should be developed by central administration.

It is also clear, in view of the problems which will be discussed later in this section of the Report, that many misunderstandings and possible differences can be solved by making some standard arrangements with the teacher in advance of his assignment to these duties.

In the early days of educational television the need for competent teachers and the "newness" of the medium led to loose or even non-existent arrangements to lure instructors. The increased use of television and the introduction of recording facilities have prompted a reversal of the situation, whereby many talented instructors now would be willing to teach via television <u>if</u> firmer policies concerning their rights were established.

2. The Teacher's Relation to a Production Group.

The production of educational programs for all the new media such as television, radio, films, and auto-instructional devices has at least one element in common; they all are generally group products. In addition to the teacher or team of teachers, the production of these programs frequently requires the services of producers, directors, subject matter specialists, curriculum advisers, writers, artists, scenery designers, and cameramen. Because these programs are group products, they are usually originated and organized by an institution or corporation and, as has been pointed out, become the property of the institution or corporation.

The teacher or professor, however, has a professional interest in the production over and above any property interest or contractual right he may have. One of these problems is the extent of his control over the content of the program. A survey of current practices shows that the teacher or team of teachers is recognized as having the major control over the educational content of the programs. In a few cases, notably in programs prepared for general or cultural education, the content is determined by the producer or writer; sometimes jointly by teacher and writer or producer. On occasion the content is determined by a departmental committee. A person familiar with the particular medium advises the teacher on content in almost every case. In a substantial majority of the elementary and secondary schools or school systems, content is determined by a committee usually composed of a combination of teachers, curriculum supervisors, administrators, and media specialists.

The working relationships between the teacher (either as a content specialist, a writer, or a performer) and his production group are so varied and so intimate as to make it impossible to codify them or to set them out in any contractual arrangement. The production of an educational program most often represents a give-and-take between the professional teacher and the professional media staff, each contributing his special knowledge and talents to the end product.

One disturbing problem that needs clarification is the right and responsibility of the teacher to determine if and when an educational program needs revision. When a radio or television program was given

only "live," no problem of revision arose; but with the recording and re-use of programs questions arise as to the distribution of the program, the time period for its re-use, and as to its revision. The problems of compensation both initially and for re-use and of control of distribution and re-use are discussed below. Here we are concerned with the problem of revision. The wide-spread use of videotape (85 per cent of institutions recording their programs) has meant that many shows are pre-recorded for convenience, then erased when used. It should be noted, however, that programs recorded today - particularly those in some of the physical sciences - might well be outdated tomorrow.

Existing practices among educational institutions on the question of the right to make revisions vary as they do in most other aspects of educational programing. The survey shows that most educational institutions have not yet faced up to the problem of the right to revise. Only about 11 per cent of the replies indicated that the teacher had no rights to require revision, to withdraw the program, or to determine its life. In television programing, about 35 per cent of the replies indicated that the teacher had some rights in this respect. It is probable that many more teachers retain this right, although no formal arrangements have been made, and little thought has been directed toward the problem.

A few producing units have codified the revision rights of the teacher permitting the institution to use the series for an initial period before revision and then permitting a revision of a percentage

of the programs. In colleges and universities, the teacher himself is generally the sole determinant of a need for revision. In many elementary and secondary schools the teacher may only suggest changes to his supervisor or curriculum committee. In general, it may be said that the authority to revise or withdraw a program, if given at all, is assigned to the person or group responsible for the original content of the show.

Because of his professional responsibility and reputation, the teacher should have a voice both in the life of the program and in determining when revisions are necessary. Since the teacher is in these situations a member of a group, and since revisions can be quite costly, it is recommended that some method or machinery for solving problems of this nature be established in each producing unit. The term of initial use should be set for a definite period, say three or five years depending on the subject matter, and the machinery for determining revisions should be specifically set out before production is undertaken. In all cases the teacher should be allowed to participate in the making of these decisions.

3. Compensation for the Teacher.

One of the difficult roblems in the production of ed cational programs for the new media is what should be the initial compensation for the teacher, and even more sticky, what if any arrangements should be made to compensate him for recording and for various types of re-use. Here again the existing pattern is confusing and variable. In

the past when no permanent type of recording was done, the teacher for the most part either donated his services or was given released time from other duties. Very few educational radio or television stations considered the compensation of the teacher as part of the cost of producing the program. Unlike the producer or the cameraman, the teacher's services were considered a gift either from him or from the educational institution, and his employment by a department precluded any thoughts of additional compensation for television appearances.

Today the methods of compensating the teacher for the initial preparation of an educational program cover a wide gamut. For example, some 27 per cent of the college and 9 per cent of the elementary and secondary television-producing units replying to the survey report that the teacher receives no compensation for his services, but that he does it all on his own time. This is an even more common practice in the production of radio programs. In some 40 per cent of replying institutions which produce motion pictures, the teacher receives no compensation. Programs for which no compensation is given are usually of the cultural or public affairs variety and frequently are one-time-only events. In such cases the teacher is more likely to assume the role of a member of the community than an instructor or educator.

The next most common practice is to provide the teacher with released time to work on the cultural or instructional program. This in practice means that the teacher performs the services as a

regular part of his job and is given time off from other teaching duties without any additional compensation. In most situations an attempt is made to equate the work done on the program with a specific percentage of what might be considered a full teaching load. Since a teaching load varies from one school system to another, and even more from one college or university to another, the released time for program production also varies. The common practice seems to be to recognize that one television course equals two regular courses. However, a significant number of schools equate one television course with only one regular course.

About 18 per cent of the replying colleges and universities report that they assign a teacher full time to the production of television programs. One institution reports a formula under which one television course equals a full load. Others report that a full load consists of two television courses. Over 60 per cent of elementary and secondary schools indicate a similar full-time assignment. More and more institutions are making provision for some proportion of time off during the term or semester in advance of the offering of the course in order to permit the teacher sufficient time for preparation.

In the production of educational motion pictures, the pattern is about the same as in television. Most of the teachers receive no extra compensation but participate as part of the regular job or receive released time from other duties. Here again, the two to one ratio is fairly common, two regular classes equaling one filmed class. More than half the producing units reporting indicate that the amount of

released time "varies." In radio instruction, a common practice seems to be to recognize a one-for-one ratio in determining a full teaching load. Since the development of auto-instructional devices by schools and colleges is largely an experimental project, the teachers or researchers who work on these programs usually perform the work as part of their research assignment or on their own time.

The pay scales for educational programs vary even more than the methods adopted for released time. Where a definite monetary reward is to be made, institutions may choose between granting a general increase in salary, making specific payments for specific shows or courses, and in a few cases giving the teacher an option on any royalties which might be earned by publication of his work.

Only a very few producing units recognize the talent and work involved in producing an educational program by a general increase in salary for the teacher. They report a higher pay schedule, one which is usually ten to twenty per cent above regular classroom salaries.

About 30 per cent of all teachers reported engaged in television production receive specific payments for specific programs. The bases for determining proper compensation range from payment by the minute to payment established by the number of students enrolled or credit hours taught. The scale varies from as little as $10 an hour to $150 for the same amount of time, although in general teachers receive between $25 and $50 per produced half hour. Wide variations occur between and even within institutions, indicating that precedent often precludes logic. Some institutions pay a higher rate if the work is done at night or if

the teacher is a union member, and a number report an unspecified fee on a per-program basis. A few institutions pay according to the scale set by the American Federation of Television and Radio Artists.

It would be presumptuous for this report to recommend a standard method of compensating a teacher for participation in an educational program. However, the advantages and disadvantages of several methods of payment can be listed. The first would be payment of an initial and final sum. This method has the advantage of being simple, definite and avoiding complicated accounting procedures. The producing owner retains complete freedom to make any future use of the program. Its disadvantage is that it does not permit the teacher to share in any future revenues from sale, license or rentals.

A second method of compensating the teacher would be an initial payment (or released time) plus a royalty or percentage of future revenues. This method has the advantage of permitting a reduced initial payment and allowing the teacher to share in future revenues. Its disadvantage is that it requires a fairly complicated system of bookkeeping and the chore of making out annual payments, frequently in small amounts.

A third method would be to provide all compensation in the form of royalties without an initial payment. This method would give the producing unit the right to use the program within its own jurisdiction and would base the teacher's entire compensation on outside income. It, too, would require an accounting of costs and revenues which might in some cases prove burdensome.

To summarize, the existing payment practices vary in a wide range. In most cases the talent cost of the teacher has not been considered as part of the cost of producing the program, but rather a cost to be borne by the employing department. It is recommended that the teacher's contribution should be recognized by appropriate (and in many cases) increased compensation for the time and talent necessary to produce an acceptable educational program.

The assumption might be made in the above report of compensation that the salary and fees are minimal largely because the programs are one-shot productions and are not recorded or re-used on a wider basis. However, the survey shows that even when the programs are recorded and re-used, the teacher receives very little additional reward. Only a handful of institutions give the teacher additional payment when the television program is re-run within the institution, and even more significant, there is practically no payment made to teachers when the program is licensed, sold or exchanged with another institution. The same pattern of no payment appears to exist among those educational units which produce motion pictures. In justification for the practices of program-producing units, it should be pointed out that most of them do not charge outsiders for the use of their programs, so that in most cases no additional revenue is produced which might be divided with the teacher. Rarely is any profit produced. It should also be mentioned that almost without exception, other members of the production team do not receive an extra return when the program is rented, sold, or exchanged outside the producing unit.

4. The Teacher's Control Over Re-Use and Distribution of the Program.

If the new educational media are to fulfill their role in the American system of education, it seems logical that time, effort and money can be saved if tested and outstanding educational programs are made readily available for use before new and different audiences. Educational institutions find it expensive to produce a course of study on television--not only expensive but time and talent-consuming; and unlike commercial television the original exhibition seldom reaches more than a small percentage of the potential audience. Re-use either within the producing institution or by sale, rent or license to other institutions appears to provide an opportunity to gain the maximum results from an educational tool and at the same time to reduce the per unit cost by widespread distribution. If school system A produces an excellent fourth grade arithmetic course, there should be no reason why this course could not be shown to several generations of fourth graders both within the originating school system and also to fourth graders in other school systems. The same interchange and distribution should be possible among institutions of higher education.

As the re-use and distribution of recorded educational programs expands, the producing institution and the teacher face a number of problems. First is the problem of making initial arrangements so that the program can be used outside the originating system. Before production starts, all participating personnel should be informed either formally or informally that the institution reserves the right to distribute the program both within and outside the originating system.

Secondly, the producing unit should set up a procedure for licensing or rental. This Report does not attempt to recommend a scale of charges for rental or licenses. However, it should be pointed out that before the producing unit makes and offers duplicates of the original program for sale, it should proceed to protect its rights by copyrighting the program. If the program is licensed only for limited exhibition, the owner of the program can forgo copyright under the federal statute and rely for protection on the common law. (See Part I).

Approximately seven to ten per cent of the television-producing units reported in the survey that they received income for re-use of their programs. Most indicated that if a rental charge was made, it was based on an attempt to recoup costs or part of costs. One reported a rental fee of $15.25 per program and another a fee of $2.50 per film. A number of units make charges only when the program is licensed to a commercial station. Most of the institutions have no fixed rental or license schedule for television programs.

The rental or license pattern in educational films is slightly more definite than in the case of television, possibly because producing institutions have had a longer experience with the rental of films. Most of the film-producing units attempt to recoup costs from rentals, and these costs are usually returned for the production of new films. A large number of units report that the rental fee is based only on the cost of making a duplicate of the film.

In radio, only a small minority of producing units charge rentals

for sound recordings of educational programs. Almost 90 per cent of the replies to this question indicated that no fees were charged for re-use. Where fees are charged, the objective seems to be to recoup costs, and rarely is a profit ever expected or realized. Some radio-producing units receive a fee from all participating stations; in one case $10.00 from each. Some merely charge the cost of dubbing and transportation. Others enjoy national distribution through the National Association of Educational Broadcasters tape network, although no profit is gained from this organization.

Since there is no general pattern among producing units on the matter of charging for re-use of programs, and an equally wide variation in fees among units which make charges, it would seem to follow that royalty or other payments to the production staff including the teacher would also vary widely. Among television program producers, only six per cent in higher education and three per cent in elementary and secondary education reported that additional compensation is given the teacher for re-use of the program within the originating institution. More than half reported no payments, and from the rest no answer. Among the 15 producing units in higher education which specified the extra compensation, the larger number indicated that the teacher's compensation was not in the form of money but in extra time off. A not uncommon fee for re-use within the institution was $15.00 per program; another was one-fourth of the original fee for the first four showings and one-fifth for additional showings. One university reported that the teacher was paid 40 per cent of his salary for the right to re-use the

program. Some universities felt it was an "honor" for the instructor if his program was re-used.

Radio-producing units almost unanimously reported that no extra compensation is given the producing team or the teacher when the program is re-used within the originating institution. About 75 per cent of the film-producing units in higher education indicated that no extra compensation was provided when the film was re-run within the institution.

Somewhat surprisingly the same pattern of payment seems to exist where the educational program is made available to another educational institution. Only about seven per cent of all reporting institutions show that extra compensation is given when the television program is sold, rented, or exchanged with another educational institution or with a library or commercial enterprise. Among those which made charges for outside use, fourteen units gave a brief listing of rates. These listings ran from such a definite rate as $15.25 per program to such generalities as "part of cost restored." One university has a fee based on course enrollment, another has a rate based on cost of materials and labor, and others charge only when the program is broadcast on a commercial station.

More institutions appear to compensate the teacher for outside use of films than for television programs. Some 15 per cent of film-producing units reported that they made payments to the teacher. Several units pay a teacher at the rate of 50 per cent of the income from the film. A few make payments only when costs have been covered. It is almost universal among institutions of higher education not to make any

payments to teachers for the sale, rental or exchange of audio-tapes of radio programs.

A third disturbing problem growing out of the re-use of educational programs is the teacher's right to determine how widely the program should be used and for how long a period. Legally the owner-producer of the program has the right to make any use of the program he wishes unless controlled by a definite contractual arrangement with the teacher or other members of the producing team.

As pointed out above (p.) the teacher should by formal or informal agreement retain the right to participate in the decisions regarding revisions of the program, and the same pattern should exist for re-use or distribution. The length of time the program should be made generally available should be specified. In some cases it would be desirable also to specify that the program was limited to use by educational rather than by commercial outlets, and in some cases it might be desirable to limit the distribution to participating educational units or to school systems or universities within a specified geographical area. In any event the the teacher should be made initially aware of the possibility that his program might receive a distribution outside the producing unit.

Two special situations involving the teacher and his program merit a brief discussion. The first is when the teacher is no longer employed by the institution for which the recording was originally made. May the producing institution continue to use the program inside and outside after the teacher has left employment? Legally the producing

unit has the right to perpetual use of the program unless the teacher has a contract or agreement terminating its use. A few institutions of higher education recognize the right of a teacher to withdraw the program upon termination of employment, but in most cases the producer retains full control of re-use. A significant number of units reported they had no policy on this problem because they had not yet encountered it. One unit reported that it retained control for three years, after which the teacher could withdraw the program. Another reported that the problem would be negotiated before the teacher left employment. The same pattern appears to exist in the control of radio programs. Fifteen per cent of the institutions allow the teacher to withdraw the program when he leaves employment. Most respondents indicated they had no answer or policy on this matter. Only a small minority of film-producing units indicated that the teacher had the right to withdraw the program when he left the employment of the producing institution. A few reported that it was a matter of individual negotiation, and about 25 per cent indicated that they had no answer or policy on the matter. It is assumed that the same answers would probably be given to the situation where the teacher dies while the program is still usable.

The second situation arises when the teacher is still employed by the producing unit but is no longer associated with the course for which the recording was made. Under these circumstances may the institution continue to use the program or does the teacher have the right to restrict its use? Here again the producing unit normally has

the legal right to continue using the program unless there is a definite contractual provision reserving the teacher's right to withdraw it. Most institutions of higher education have no policy on this situation. Only a small minority give the teacher any control when he no longer is associated with the course.

The answers to this and the preceding question indicate that very few institutions have given serious consideration to these matters, probably because they have never occurred. Many schools indicated in previous parts of the survey that they would usually respect the wishes of the teacher, although as previously noted, without a clear contractual agreement, the right for re-use rests ultimately with the producing institution.

5. Supplementary Instructional Materials.

Many of the educational programs prepared for the new media, especially those prepared for high school or college credit, require the production of supplementary or ancillary printed or duplicated materials. It is a common practice to supply outlines, reading lists, study guides, and even readings to supplement the educational materials transmitted by radio, television or film.

Sixty-five per cent of the colleges and universities reported that some form of supplementary material is prepared and circulated in connection with educational programs; about 95 per cent of elementary and secondary schools produce such materials. In most cases the presumption is that the institution or organization producing the program

is the legal owner of these supplementary materials. However, in about a third of the colleges and universities, the right to own these materials is assumed to be in the person or persons who prepared them. In a few cases the ownership has been transferred to a commercial publisher.

Surprisingly in 80 per cent of the cases no copyright is taken out to protect the supplementary materials from unauthorized use. The procedure for protecting these printed or duplicated materials under the federal copyright statute is fairly simple and inexpensive, and in many situations the control of the supplementary materials may serve to restrict the unauthorized use of the new media program as well as use of the duplicated materials.

Although in almost all cases the teacher or a team of teachers prepares the supplementary material, the pattern of compensation for such service is extremely varied. In most cases payment for supplementary materials is included in the participation fee or in the method used for original compensation. A few institutions permit the teacher to take title to these materials and to arrange for their publication with a commercial publisher, presumably on a royalty basis. Most teachers, however, receive only released time for the preparation of course materials, although 20 per cent of the institutions reporting indicated that specific payments in addition to regular salary were made to the teacher or team of teachers which produced the supplementary guides. One institution pays $100 per outline, another $200 per outline, another $250 per semester or $10 per lesson, and still another $74 per telecourse. Others answered that payment was based on class enrollment or an estimate of the time involved.

6. Methods and Procedures for Establishing the Teachers' Rights.

The survey of existing practices among both institutions of higher education and public schools shows that only about ten per cent of those reporting indicated that they had adopted a policy on the matters discussed in this part of the Report. Twenty per cent indicated that a policy statement or special contract was in the process of development. Seventy per cent had developed no contractual agreement or policy statement.

It appears that the teacher who engages to prepare and participate in the production of an educational program for a commercial station or network or for a commercial publisher has an opportunity to negotiate for the recognition of his compensation and rights to control the content and distribution of the program. Commercial organizations are accustomed to dealing with independent contractors and usually have available an elaborate contract setting forth the rights of all parties. A sample of such a contract is included in Appendix B.

The independent television or radio station which engages in the production of educational programs appears to have made more progress toward solving or at least setting up machinery for solving the problems of the relation of the teacher to the program than have, for instance, either the public schools or most institutions of higher education. This development is understandable when it is recognized that the independent producing station is in much the same position as the commercial outlet and must contract for and hire personnel for the specific job of producing a specific program. However, neither the independent producer

nor the producing units of educational institutions have generally adopted well-defined policies for the re-use and further distribution of their programs.

There appear to be three possible procedures for setting out policy and establishing the rights and obligations of teachers who participate in the production of these programs. One is by special contract or appointment of the teacher which defines his duties, rights and responsibilities. In this case the teacher negotiates with the hiring official as an individual,and the teacher has the right to accept or reject the contract and to suggest modifications or changes. In the end he is bound by the agreement which he accepts or signs. Samples of such an agreement between the producing unit and the teacher are included in Appendix B.

A second method is by official adoption of a general statement of policy governing the matters discussed in this part of the Report which by reference is made a part of the employment or appointment of the teacher.

A number of institutions of higher education have drafted, and some have adopted, a general policy statement on the subject under discussion and these statements have been included in the official rules, regulations and by-laws of the institution. Here again the teacher can see what he is accepting by entering employment, and of course he can negotiate for exceptions to the general policy statements. This second procedure would seem to have some advantages over the individual and separate contract. In the first place, the policy

would be general and would affect all employees or appointees, and secondly it would avoid the construction of a long and involved individual agreement. Examples of such a general policy statement are included in Appendix A.

A third possible procedure for determining and establishing the rights of the producing institution on the one hand and the rights of the participating teacher on the other is through the acceptance of a collective bargaining agreement. From the survey it was evident that a number of institutions had either officially or unofficially, formally or informally, accepted the code of practices and rights as well as compensation scales of some of the recognized collective bargaining units in the commercial field. Most of these collective bargaining agreements are carefully drawn and face up to most of the problems discussed in this Report. It is, of course, possible for a producing unit to accept the code of fair practices or even the compensation scales of one of the bargaining units without entering into a formal agreement with a union or professional organization.

Each producing unit or educational institution engaged in the production of educational programs for the new media should consider which of the three procedures best fits its particular situation and should proceed as soon as possible to determine the route it is prepared to follow in determining its own rights and the rights of participating teachers and professors.

Part IV

Recommendations

1. The rights of the owner of an educational program prepared for the new media appear to be adequately protected under the common law rules of copyright or literary property enforceable under state law. Programs may be rented or leased for restricted use without destroying the common law protection. However, if duplicate copies of the program are prepared for sale, the owner should proceed to comply with the formalities of the federal copyright statute to protect his interests from unauthorized use.

2. Full and unrestricted ownership of the educational programs prepared for the new media is normally vested in the institution or organization which initiates the program and pays for its production, and therefore any teacher or performer wishing to retain any aspects of control of a program should have a definite contract, agreement, or statement reserving appropriate rights for him.

3. The arrangement between an educational program producer and the teacher (either by direct contract, by reference to an adopted set of by-laws or policies, or by collective bargaining agreement) should cover the following:

a) initial compensation

b) right to re-use both within and outside the originating organization

c) compensation for re-use both within and outside the originating organization

d) the right to specify the life of the program or length of time within which it may be used

e) right to revise a part or all of a program or series of programs

f) right to withdraw the program based on termination of employment, death, reassignment, or obsolescence.

4. Educational organizations with an interest in the new media should oppose the recommendation of the Copyright Office that the revision of the federal Copyright Act provide for the termination of common law copyrights when a work has been "publicly disseminated" in any of the following ways: (1) publication of copies, (2) registration, (3) public performance, or (4) public distribution of sound recordings. The adoption of such a definition of "publication" would require the formal statutory copyrighting of <u>all</u> educational programs prepared for the new media if the owner wished to protect his rights.

5. The present provisions of the federal Copyright Act permitting the use of non-dramatic literary materials and music in the production of not-for-profit educational programs without requiring clearance from the copyright owner should be retained in the statute. However, the recording provisions of Sec. 1(c) and Sec. 1(e) should be clarified to make certain that the not-for-profit use described above also permits the recording of these materials for not-for-profit purposes.

6. Organizations representing education in general should join with other organizations and institutions having special interests in the new educational media in the establishment of a Copyright Committee with the responsibility of developing legislative proposals for the revision of the present federal Copyright Act.

7. It is recommended that at some time in the near future a study be made of the methods of protecting educational programs for the new media in foreign countries so that international distribution can be facilitated. At the same time a study should be made of the existing restrictions on the use of educational materials <u>from</u> foreign countries in the preparation of new programs.